100417

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted] 163

AUGUST DORCHY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS.

ROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED DECEMBER 13, 1923.

(29,279)

(29,279)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 729.

AUGUST DORCHY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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IN THE

Supreme Court of the State of Kansas.

Caption.

No. 24174.

THE STATE OF KANSAS, Appellee,

vs.

ALEXANDER HOWAT et al. (AUGUST DORCHY), Appellant.

Be it remembered, That on the 25th day of February, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Certified copy of a Notice of Appeal together with a certified copy of the Journal Entry of Judgment, which are in the words and figures as follows, to-wit:

[Filed Feb. 25, 1922.]

No. 24174.

In the District Court of Cherokee County, Kansas, Sitting at Columbus, in said County.

[Title omitted.]

Notice of Appeal.

The above named plaintiff, The State of Kansas, and Leo Armstrong, County Attorney of Cherokee County, Kansas, are hereby notified that the above named defendants, Alexander Howat and August Dorchy, appeal from the Court's findings of fact and conclusions of law, and appeal from the judgment and sentence of the above entitled Court hereinbefore made and entered in the above entitled case on the 8th day of July, 1921, in which judgment was rendered by said Court in favor of said plaintiff and against said defendants and in which judgment and sentence was passed by the said Court upon said defendants upon the said date; and the said defendants, Alexander Howat and August Dorchy, appeal from said judgment and sentence as follows, to-wit:

First. From the order and judgment of the Court in overruling defendant's motion to quash the Information filed herein.

Second. From the order, judgment and ruling of said Court excluding coal miners from qualifying as jurors to try said case.

Third. From the order and judgment of the Court in overruling defendant's objection to the introduction of any testimony in the

Fourth. From the order and judgment of the Court in overruling defendant's demurrer to the State's evidence and motion for the discharge of the said defendant.

Fifth. From the order and judgment of the Court in overruling defendant's motion in arrest of judgment.

3 Sixth. From the order and judgment of the Court requiring the defendant to execute to the State of Kansas a bond to not again violate the law, under which their conviction was had, pending an appeal from his said conviction herein.

Eighth. Defendants predicate their appeal herein solely upon the error of the court in his rulings, orders and judgments only as such rulings, orders and judgments constitute error as relates to the constitution of the United States and the laws of the United States. And defendants raise no question of error as it relates to the Constitution and laws of Kansas.

And said defendants appeal from the judgment and all orders and rulings of the Court generally and from the Court's instructions to the jury as to the Law governing in said case, and said defendants appeal from all of the final orders, findings and rulings made and entered by said Court in the above entitled cause adverse to the said defendants and in favor of the plaintiff and all of the above and foregoing you are hereby notified and you will duly take notice of the same. Phil Callery, J. E. Callery, Attorneys for Defendants.

I, the Undersigned attorney of record for the plaintiff above named acknowledge service of a copy of the above and foregoing Notice of Appeal on me this 6th day of February, 1922. Leo Armstrong, Attorney for Plaintiff, County Atty., Cherokee County, Kansas.

4 In the District Court of Cherokee County, Kansas, Sitting at Columbus.

[Title omitted.]

Journal Entry of Judgment.

The State of Kansas,
Cherokee County, ss:

Pleas and Proceedings in the District Court of the Eleventh Judicial District of the State of Kansas, Sitting at the City of Columbus, Within and for Cherokee County in said State, at the May Term Thereof, Begun and Held in said County and State, Commencing on the 2nd Day of May, A. D. 1921, as by Statute Required.

Present: The Honorable F. W. Boss, District Judge of the said Eleventh Judicial District of the said State; William Harvey, Sheriff of said County, and C. E. Rumery, Clerk of said Court, within and for said County.

Now on this 27th day of June, 1921, the same being one of the regular days of the May, 1921 term of the Eleventh Judicial District of the State of Kansas, came on for hearing the above entitled action. The State of Kansas, plaintiff, appearing by Richard J. Hopkins, Attorney General of Kansas, C. B. Griffith and J. G. Egan, Assistant Attorney Generals of the State of Kansas, and Leo Armstrong, County Attorney of Cherokee County, Kansas, and the defendants, Alexander Howat and August Dorchy, appearing in person and by their attorneys, J. I. Sheppard, Redmond S. Brennan, James Avery, C. A. McNeill, Charles Stephens and Frank E. Dresia. Both plaintiff and defendants announce to the Court they are ready for trial; thereupon the defendants ask leave of the Court to withdraw their pleas of not guilty heretofore made herein on the 2nd day of May, 1921, which leave was, by the Court, granted, after which the defendants filed a Motion to Quash the Information filed herein, which motion was by the Court after hearing said motion and the argumen-s of counsel, overruled. Thereupon, the defendants waive arraignment and entered their pleas of not guilty. Thereupon, the Jury was called and the empanelling thereof began, and was proceeded with until noon, at which time the Court, after admonishing the jurors, swore Deputy Sheriff, Thomas J. Harvey, as Bailiff, and ordered him to take charge of the jurors. Court was then adjourned until 1:30 P. M. of said day. At 1:30 P. M. of said day, said Bailiff returned into Court with the jurors and the empanelling of the jury was proceeded with until 5:00 o'clock P. M., at which time the Court, after admonishing the jurors, again placed them in charge of said Bailiff, Deputy Sheriff, Thomas J. Harvey, and adjourned Court until 9:00 o'clock, Tuesday morning June 28, 1921.

At 9:00 o'clock A. M. on said last named date, Bailiff returned into Court with the jurors and the empanelling of the jury was proceeded with until 4:05 o'clock P. M., at which time the Court, after admonishing the jurors and placing them in charge of the Bailiff, Thomas J. Harvey, took an adjournment until 9:00 o'clock A. M., June 29th, 1921.

At 9:00 o'clock A. M. on said last named date, the Bailiff returned into Court with the jurors and the empanelling of the jury was proceeded with and completed. The jury was then sworn by the Clerk of the Court to try the case. Counsel for both plaintiff and defendants make their opening statements, after which the State offers its evidence in part. At 5:00 o'clock P. M. the jury is admonished and placed in charge of Bailiff, Thomas J. Harvey, and Court adjourned until 9:00 o'clock A. M., June 30th, 1921.

At 9:00 o'clock A. M. June 30th, said Bailiff returned into Court with the jurors. Both defendants are present in person and by their attorneys. The State offers the balance of its evidence and rest their case. The defendants introduce no evidence and thereupon rest their case. The jury is instructed by the Court and the case argued by attorneys for the State and attorneys for the defendants, after which the jury retired to deliberate upon the verdict in charge of Bailiff, Thomas J. Harvey.

The jury returns into open Court in charge of the Bailiff at 2:15 o'clock P. M., July 1, 1921, with their verdicts finding each of the defendants guilty of a misdemeanor. Said defendants, Alexander Howat and August Dorchy, being present in person and by their attorneys, each of the verdicts *are* read by the Clerk of the Court, after which the jury is discharged by the Court. Sentence day for said defendants is, by the Court, set for July 8th, 1921, and said defendants permitted to go on the present bonds and commanded to appear for sentence at 9:00 o'clock A. M. on said last named date.

And now on this 8th day of July, 1921, at a regularly adjourned day of said term of Court, this cause came on for the judgment and sentence of the Court against the defendants, Alexander Howat and August Dorchy, upon the verdicts of guilty heretofore found against them herein by the jury, upon the Information filed against them herein charging a violation of the provisions of Chapter 29, Laws of Kansas of 1920, entitled: "An Act creating the Court of Industrial Relations, defining its powers and duties, and relating thereto, abolishing the Public Utilities Commission, repealing all acts and parts of acts in conflict therewith, and providing penalties for the violation of this Act," and thereupon the State appears by C. B. Griffith, Assistant Attorney General of the State of Kansas, and Leo Armstrong, County Attorney of Cherokee County, Kansas, and by the order of the Court, the defendants appear in Court in their own proper person and by their attorneys J. I. Sheppard, James Callery, C. A. McNeill, Charles Stephens and Frank E. Dresia. A Motion for New Trial in this cause heretofore filed herein on the 1st day of July, 1921, and affidavit- of jurors are submitted to the Court without argument, which Motion is, by the Court, overruled. And the defendants being now caused to stand before the Court, are informed by the Court of the said verdict of guilty heretofore found against them herein, on said Information filed against them herein by the said Richard J.
7 Hopkins, Attorney General and Leo Armstrong, County Attorney, aforesaid, and each is asked by the Court whether he has any legal cause to show why the judgment and sentence of the Court should not be pronounced against *them* upon the said verdicts of guilty herein, and after listening to each of said defendants, no sufficient cause being alleged by the defendants, or appearing to the Court why judgment should not be pronounced,

It is therefore, Now by the Court here considered, ordered and adjudged that the said defendants, Alexander Howat and August Dorchy, be and they are hereby sentenced to confinement to the County Jail of Cherokee County Kansas, each for the period of six months and that each pay fine unto the State of Kansas in the sum of $500.00, and that they pay the costs of the prosecution herein against them, taxed at $—, and that they be and are hereby committed until said costs and fines are paid. Execution is stayed sixty days in which for defendants to prepare appeal, and bonds are fixed for each defendant. An Appearance Bond for each defendant is fixed at $2,000.00; Bond Not to Violate said Law for each defendant is fixed at $2,000.00. Defendants are, by the Court permitted to go on their present bond during the stay of execution. W. F. Boss, Judge of the District Court.

Approved: Richard J. Hopkins, C. B. Griffith, J. G. Egan, Leo Armstrong, Attorneys for Plaintiff. J. I. Sheppard, Redmond S. Brennan, James Callery, F. E. Dresia, Chas. Stephens, C. A. McNeill, Attorneys for Defendants.

In the District Court of Cherokee County, Kansas, Sitting at Columbus.

[Title omitted.]

Certificate as to Bonds.

I, C. E. Rumery, Clerk of the District Court within and for the County and State aforesaid, do hereby certify that the Bond Not to Violate the Law under which conviction was had, in the sum of $2,000.00, for each defendant, and a Bond in a sum double the Amount of the fine and costs, for each defendant, in said case were given, and after a satisfactory examination of the sureties thereon, were duly approved by me, and filed for record in this office. After which an Appearance Bond in the sum of $2,000.00, for each defendant was given, and duly approved by Hon. F. W. Boss, Judge of the above entitled Court, and all of said Bonds are now duly filed for record in my office in the City of Columbus, Cherokee County, Kansas.

Witness my hand and official Seal this 24th day of February, A. D. 1922. C. E. Rumery, Clerk of the District Court of Cherokee County, Kansas, Sitting at Columbus. [Seal.]

In the District Court of Cherokee County, Kansas, Sitting at Columbus.

[Title omitted.]

Journal Entry on Appeal Bonds.

Now on this 6th day of February, A. D. 1922, the same being one of the regular days of the January, 1922 term of above named court, came on for approval the Bonds for Appeal of the Above entitled case to the Supreme Court of the State of Kansas, defendants being present by their attorney, Phil Callery. After having filed their notice of appeal and serving Leo Armstrong, County Attorney of Cherokee County, Kansas, one of the attorneys for plaintiff with a copy thereof, and after having given a bond in the sum of $2,000.00 not to violate the Law under which conviction was had, pending the appeal, and a Bond in a sum double the amount of fine and costs in said case, which Bonds were, after a satisfactory examination of the sureties thereon, *were*, by the Clerk of the District Court of Cherokee County, Kansas, approved. After which the Appearance Bond is presented to the Hon. F. W. Boss, Judge of the above named Court

and after being advised as to the financial responsibility of the sureties thereon and that all other things necessary to perfect said appeal had been complied with, doth approve said Appearance Bond and further execution of said judgment and sentence is hereby stayed pending said appeal. F. W. Boss, Judge Dist. Court.

11 **Clerk's Certificate.**

STATE OF KANSAS,
Eleventh Judicial District,
Cherokee County, ss:

I, C. E. Rumery, Clerk of the District Court of the Eleventh Judicial District of the State of Kansas, sitting within and for the county aforesaid, do hereby certify the above and foregoing to be true, full and complete copies of the Notice of Appeal, Journal Entry of Trial, Judgment, & Sentence, Certificate of Clerk as to Bonds and Journal entry on Appeal Bonds, filed in the herein entitled cause as the same remains of record in my office in the city of Columbus.

Witness my hand and the seal of said court, affixed at my office in Columbus, this 24" day of February A. D. 1922. C. E. Rumery, Clerk District Court. [Seal.]

12 Be it further remembered, That afterwards, and on the 6th day of June, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, an Abstract of the record, prepared by the appellant, which abstract is in the words and figures as follows, to-wit:

13 In the Supreme Court of the State of Kansas.

[Title omitted.]

Abstract of Record.

STATE OF KANSAS,
Cherokee County, ss:

Before J. R. Carter, a Justice of the Peace of City of Columbus, County and State Aforesaid.

THE STATE OF KANSAS, Plaintiff,

vs.

ALEXANDER HOWAT and AUGUST DORCHEY, Defendants.

Complaint.

Richard J. Hopkins and Leo Armstrong being each first duly sworn on oath states:

14 That on or about the 3rd day of February, A. D. 1921, a coal mine known as mine H situated in Cherokee County,

State of Kansas, at a point about three miles in a northwesterly direction from Scammon, in said County and State, was operated by George K. Mackie Fuel Coal Company, a corporation, organized and existing under and by virtue of the laws of the State of Kansas.

That on or about said 3rd day of February, A. D. 1921, there existed in said county and state a labor Union and association of persons engaged as workers in the industry or employment in mantaining and operating coal mines in Cherokee County, Kansas, including said coal mine, known as mine H, operated by the George K. Mackie Fuel Company, for the purpose of and in mining and in the production of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in the State of Kansas, as aforesaid,

That said Labor Union or association of persons was known as district No. 14 United Mine Workers of America, That the defendant Alexander Howat was at said time an officer and president of said labor union and association of persons and the defendant August Dorchy was at said time an officer and vice-president of said labor union and association of persons, that at said time certain persons known as Owen Pryor, William Colman, Ab. Brown, Horace Dixon, William Richardson and George Young, and many other persons whose names are unknown to the said Richard J. Hopkins, Attorney General of the State of Kansas, and the said Leo Armstrong, County Attorney of said Cherokee County, were members of, belonged to and were a part of said labor Union or association of persons in said County and State and were at said time engaged as workers by the said George K. Mackie Fuel Company at its said mine H in said County and State, in the maintenance and operation of said coal mine known as mine H, for the purpose of and in the mining and production of coal for and in common use for domestic, manufacturing and transportation purposes in the State of Kansas, as aforesaid.

That on or about said 3rd day of February, 1921, in said County and State, the defendants Alexander Howat and August Dorchy, each unlawfully, willfully, intentionally and feloniously used his respective power, authority and influence incident to his respective position as an officer in and of said Labor Union and association of persons known as district No. 14 of the United Mine Workers of America, as aforesaid, that is the said Alexander Howat as an officer and president of the said Labor Union and association of persons and the said August Dorchy as an officer and vice-president of the said labor union and association of persons, and said defendants Alexander Howat and August Dorchy, did each thereby, in said County and State, Unlawfully, feloniously, willfully and intentionally, influence and impel the said Owen Pryor, William Colman, Ab. Brown, Horace Dixon, William Richardson and George Young, and said other persons hereinbefore referred to whose names are hereinbefore averred to be unknown to the said Richard J. Hopkins, Attorney General of the State of Kansas, and said Leo Armstrong, County Attorney, of said Cherokee County, and who were then engaged as workers, in and employed in the maintenance and operation of said coal Mine H, for the purpose of and in the mining and production of

coal and in common use as fuel for domestic, manufacturing and transportation purposes in the State of Kansas, as aforesaid, to quit their said employment in said coal mine H, and at said time the said persons did in said County, and State as a result of being so influenced and impelled by said defendants, Alexander Howat and August Dorchy, did on or about February 4, 1921, quit their said employment in said coal mine H, all for the purpose of hindering, delaying, interfering with and suspending the operation of said coal mine H, in the production and mining of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in the State of Kansas, as aforesaid, all contrary to the form of the Statutes in such cases and against the peace and dignity of the State of Kansas. Richard J. Hopkins, Attorney General. Leo Armstrong, County Attorney.

Subscribed and sworn to in my presence this 17th day of February, 1921, in and for the City of Columbus, Cherokee County, Kansas. J. R. Carter, Justice of the Peace.

17 **Journal Entries.**

February 17th, 1921, Warrant issued and delivered to William Harvey, Sheriff, March 1st, 1921, warrant returned and filed,

Received this writ February 17th, 1921, February 17th, 1921 executed the same by arresting the within named Alexander Howat and August Dorchy, and bringing them before the within named Justice of the Peace. William Harvey, Sheriff. Fee $6.95.

February 17th, 1921, defendants Alexander Howat and August Dorchy appeared, waived reading of complaint and warrant, plead not guilty, gave bond, each in the sum of $4,000.00 for their appearance on March 1, 1921.

On this first day of March, 1921, this cause came on for hearing at the hour set therefor, plaintiff being present by Richard J. Hopkins, Attorney General and Leo Armstrong, County Attorney, Cherokee County, Kansas, and defendants being present in person and by their attorneys, Phil H. Callery, and J. E. Callery,

Both sides announce themselves ready for trial and the following motions were introduced by defendants' Attorneys, Motion to Quash Complaint, Motion to Quash Warrant and pretended Service, and Plea in Bar.

The above named motions were by the court overruled, whereupon the following witnesses were sworn and testified in behalf of
18 the State, and the Court after hearing all the testimony and arguments and being fully advised in the premises finds,

That there *are* probable cause for believing that there has been a crime committed, in violating the Industrial Court Law of the State of Kansas, and that there *is* reasonable grounds for believing that Alexander Howat and August Dorchy, committed said offence in and by advising the employes to quit their said employment in George K. Mackie coal mine "H" near Scammon, Cherokee County, Kansas.

Order for Bond for Continuance.

It is therefore by the Court considered, ordered and adjudged that the Defendants, Alexander Howat and August Dorchy, each enter into a recognizance unto the State of Kansas, in the sum of $4,000 each, conditioned that the said Alexander Howat and August Dorchy, defendants shall appear before the District Court of Cherokee County, Kansas, sitting in Columbus on the first day of the next term thereof to answer the complaint in said cause alleged against them and not depart same without leave, and that in default of said recognizance that the said defendants, Alexander Howat and August Dorchy be confined in the jail of Cherokee County, Kansas, until they shall be discharged according to law. J. R. Carter, Justice of the Peace.

STATE OF KANSAS,
Cherokee County, ss:

I, J. R. Carter, Justice of the Peace within and for the City of Columbus, Kansas, and County aforesaid do hereby certify that the above and foregoing is a true and correct transcript of said case as shown by my criminal Docket on page- 102-104, and that the following are all the papers filed in this case viz: Complaint, Warrant, Recognizance for Continuance, Recognizance for appearance at District Court, Subpoena, Motion to Quash Complaint, Plea at Bar, Motion to Quash Warrant and pretended service. Witness my hand this 11th day of March, 1921. J. R. Carter, Justice of the Peace.

[Endorsements omitted.]

Before J. R. Carter, Justice of the Peace in and for Cherokee County, Kansas.

[Title omitted.]

No. —.

Warrant and Service.

STATE OF KANSAS,
Cherokee County, ss:

The State of Kansas to any Sheriff or Constable of the State of Kansas:

It appearing that there are reasonable grounds for believing that Alexander Howat and August Dorchy were, on or about February 3, A. D. 1921, officers of a labor union and association of persons existing in Cherokee County, Kansas, known as District No. 14, United Mine Workers of America, and that on or about said date they have each committed the offense in the County of Cherokee and State of Kansas of unlawfully, feloniously, wilfully

and intentionally using the power, authority and influence incident to their official positions as officers in and of said labor union and association of persons and have thereby influenced and impelled other persons, that is to say Owen Pryor, William Coleman, Ab. Brown, Horace Dixon, William Richardson and George Young, and other persons whose names are unknown to the Attorney General of the State of Kansas, and the County Attorney of said County, who were at said time members of said labor union and association of persons and were at said time employed as workers in the maintenance and operation of coal mine H of the George K. Mackie Fuel Co., situated in Cherokee County, Kansas, in the mining and production of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in the State of Kansas, to quit their said employment as workers in said coal mine H in producing and mining coal for and in common use as aforesaid, for the purposes of hindering, delaying, interfering with and suspending the operation of said coal mine for the mining and production of coal for and in such common use, and that such persons so influenced and impelled, pursuant to such influence and impelling by Alexander Howat and August Dorchy, did quit their said employment at said coal mine, all for the purpose of hindering, delaying, interfering with and suspending the
21 operation of said coal mine for and in the mining and production of coal for and in common use for domestic, manufacturing and transportation purposes in the State of Kansas.

You are, therefore, commanded forthwith, to arrest Alexander Howat and August Dorchy and bring each of them before me, a Magistrate and Justice of the Peace in and for the County of Cherokee, State of Kansas, to be dealt with according to law. J. R. Carter, Justice of the Peace in and for Cherokee County, Kansas.

Received this writ Feb. 17th, 1921. Feb. 17th, 1921, executed the same by arresting the within named Alexander Howat and August Dorchy, and bringing them before the within named Justice of the Peace. Wm. Harvey, Sheriff of Cherokee County, Kansas.

No. —.

In Justice Court Before J. R. Carter, Justice of the Peace in and for the City of Columbus, Cherokee County, Kansas.

[Title omitted.]

Motion to Quash Complaint and Plea in Abatement.

[Filed Mar. 17, 1921.]

22 Come now the defendants above named and each of them for the purpose of this motion only and not appearing herein for any other purpose and move the Court to dismiss the complaint filed herein on the ground that this Court has no jurisdiction over the parties defendant for the reason that no valid lawful warrant ha

been legally served either actually or constructively upon said defendants or either of them in accordance with the provisions of the statutes of the State of Kansas, and for the further reason that neither the said warrant nor the said complaint filed herein sets out or charges the commission of any offense under or against the laws of the State of Kansas, by these defendants or either of them and for the further reason that neither the said warrant nor the said complaint charges these defendants with the commission of any offense or any crime of the violation of any valid statute or law of the State of Kansas.

The defendants and each of them move the Court to quash, set aside and hold for naught the complaint filed herein for the further reason that if the act or acts which the defendants and each of them were charged with committing, namely the calling of a strike at mine "B" of the George K. Mackie Fuel Company, be true, that such act or acts would not constitute an offense or a crime under any valid law or statute of the State of Kansas.

That defendants herein and each of them move the Court to dismiss, set aside and hold for naught the complaint filed herein and abate the further prosecution of this action for the reasons that said complaint is inferentially based upon what is known as the "Court of Industrial Relations Act," the same being Chapter 29 of the Special Session Laws of the State of Kansas for 1920, and that said Chapter 29 of the Special laws of the State of Kansas for 1920 is unconstitutional, null and void for the reason that said Court of Industrial Relations Act is violative of the defendants' and each of defendants' constitutional rights under the constitution of the State of Kansas and under the Bill of Rights of the Constitution of the State of Kansas, and that said Court of Industrial Relations Act is unconstitutional and void for the further reason that it violates the constitutional rights of these defendants and each of said defendants under the Constitution of the United States and the amendments thereto.

The defendants and each of them move the Court to dismiss, set aside and hold for naught the complaint filed herein and abate the further prosecution of this action for the further reason that the Court has no jurisdiction of the subject matter upon which said complaint is based, for the reason that the said George K. Mackie Fuel Company and its said employees, were at all times referred to in the complaint filed herein, engaged in the mining and shipping of coal from and to points outside of the State of Kansas, and were therefore engaged in Interstate Commerce and were not at any of the said times complained of in plaintiff's complaint, subject to the jurisdiction of the laws of the Courts of the State of Kansas, so far as the operation and mining and production of coal in the said mine were concerned.

Wherefor-, the defendants and each of them pray the Court for the reasons above stated that said complaint be quashed, set aside and held for naught, and that the further prosecution of this action abate and that these defendants be discharged and be permitted to go hence

without delay. Phil H. Callery, J. E. Callery, Redmond S. Brennon, Attorneys for Defendants.

Endorsed on Back as follow-: State of Kansas vs. Alexander Howat, et al. Motion to Quash Complaint and Plea of Abatement. Filed March 1, 1921. J. R. Carter, Justice of the Peace.

STATE OF KANSAS,
Cherokee County, ss:

I certify that this is the original motion to Quash Complaint in case of State vs. Alexander Howat and August Dorchy. J. R. Carter, Justice of the Peace.

[File endorsement omitted.]

25 In the Justice Court Before J. R. Carter, Justice of the Peace in and for the City of Columbus, Cherokee County, Kansas.

[Title omitted.]

Motion to Quash Warrant and Pretended Service.

[Filed Mar. 17, 1921.]

Come now the defendants above named and each of them and appear specially and only for the purpose of this Motion and for no other purpose, and move the Court to quash, set aside and hold for naught the warrant issued herein and the pretended service of the same, the return thereof, for the reason that said warrant and said return thereon show upon their face that said warrant is null and void and not in compliance with the Statutes of the State of Kansas relative thereto, and for the reason that this Court has no jurisdiction over the person of said defendants or either of them and for the further reason that said warrant does not set out or charge these defendants or either of them with the commission of any crime or offense under or against the Laws of the State of Kansas.

26 Wherefore, defendants and each of them pray the Court that they and each of them be dismissed from custody and be permitted to go hence without delay. Phil H. Callery, J. E. Callery, Redmond S. Brennon, Attorneys for Defendants.

Motion to Quash Warrant and Pretended Service Endorsed on back as follows:

[File endorsement omitted.]

State of Kansas vs. Alexander Howat, et al. Motion to Quash Warrant. Filed March 1, 1921. J. R. Carter, Justice of the Peace.

STATE OF KANSAS,
Cherokee County, ss:

I certify that this is the original Motion to Quash Warrant in case of State vs. Alexander Howat and August Dorchy. J. R. Carter, Justice of the Peace.

STATE OF KANSAS,
Cherokee County, ss:

In the District Court of said County and State.

[Title omitted.]

Information.

Count Number One.

We, Richard J. Hopkins, Attorney General of the State of Kansas and Leo Armstrong, County Attorney of the County of Cherokee, in the State of Kansas, in the name, by the authority and on behalf of the State of Kansas, for information against the defendants Alexander Howat and August Dorchy, do come now here and give the court to understand and be informed and do give the court information:

That on or about the third day of February, A. D. 1921, the coal mine known as Mine H, operated by the George K. Mackie Fuel Company, situated in Cherokee County, State of Kansas, at a point about three miles in a northwesterly direction from Scammon, in said County and State, was in operation for the purpose of and in the mining and production of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in the State of Kansas.

That on or about said third day of February, A. D. 1921, there existed, in said Cherokee County, Kansas a labor union and association of persons engaged as workers in the industry or employment of maintaining and operating coal mines in Cherokee County, Kansas, including said Mine H, operated by the George K. Mackie Fuel Company for the purpose of and in the mining and production of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in the State of Kansas. That said labor union or association of persons was known as District No. 14, United Mine Workers of America. That the defendant Alexander Howat was at said time an officer and President of the said labor union and association of persons and the defendant August Dorchy was at said time an officer and Vice-President of said labor union and association of persons. That at said time certain persons known as Owen Pryor, William Coleman, Ab Brown, Horace Dixon, William Richardson and George Young, and many other persons whose names are unknown to the said Richard J. Hopkins, Attorney

General for the State of Kansas, and said Leo Armstrong, County Attorney, of said Cherokee County, were members of, belonged to and were a part of said labor union or association of persons, in said Cherokee County, Kansas, and were at said time engaged as mine workers and were employed by the said George K. Mackie Fuel Company at its said Mine H, in said County and State, in the maintenance and operation of said coal mine known as Mine H, for the purpose of and in the mining and production of coal for and in
29 common use for domestic, manufacturing and transportation purposes in the State of Kansas.

On or about the said 3rd day of February, A. D. 1921, in said County and State, the defendants, Alexander Howat and August Dorchy, each willfully, intentionally, unlawfully and feloniously used his respective power, authority and influence, incident to his respective official position as an officer in and of said labor union and association of persons, known as District No. 14, of the United Mine Workers of America; that is, the said Alexander Howat, as an officer and President of said labor union and association of persons, and the said August Dorchy, as an officer and Vice-President of the said labor union and association of persons, did each thereby in said county and State willfully, intentionally, unlawfully and feloniously influence and impel certain persons, to-wit: Owen Pryor, William Coleman, Ab. Brown, Horace Dixon, William Richardson and George Young, and said other persons, hereinbefore referred to, whose names are hereinbefore averred to be unknown to the said Richard J. Hopkins, Attorney-General of the State of Kansas, and the said Leo Armstrong, County Attorney of said Cherokee County, who were then engaged as workers in and employed in the maintenance and operation of said coal mine H for the purpose of and in the mining and production of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in the State of Kansas, to willfully, intentionally and unlawfully cease their work, and said persons
30 did, pursuant to and by reason of said influencing and impelling by said defendants, intentionally, wilfully and unlawfully cease their work in maintaining and operating said coal mine for the production of coal therefrom. And such influencing and impelling of said persons by said defendants, and said ceasing of work by said persons were for the purpose to hinder, delay, limit and suspend the continuous and efficient operation of said mine with reasonable continuity and efficiency for the mining and production of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in the State of Kansas, and for the purpose of evading the provisions of Chapter 29, Special Session Laws of Kansas, 1920, and to obstruct, hinder and prevent the people of the State of Kansas from living in peace and security and from being supplied with coal and the necessaries of life. And that such ceasing of work by said persons, who ceased said work as aforesaid, was not an individual quitting of work by said persons, or an individual act of said persons, for the purpose of exercising any individual right, but was for the unlawful purposes aforesaid.

All contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Kansas.

Count Number Two.

We Richard, J. Hopkins, Attorney General of the State of Kansas, and Leo Armstrong, County Attorney — the County of Cherokee, in the State of Kansas, in the name, by the authority and on behalf of the State of Kansas, for information against the defendants, Alexander Howat and August Dorchy, do come now here and give the Court to understand and be informed and do give the Court information;

That on or about the third day of February, A. D. 1921, the coal mine, know- as Mine H, operated by the George K. Mackie Fuel Company, situated in Cherokee County, State of Kansas, at a point about three miles in a northwesterly direction from Scammon, in said County and State, was in operation for the purpose of and in the mining and production of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in the State of Kansas.

That on *ar* about said third day of February, A. D. 1921, there existed, in said Cherokee County, Kansas, a labor union and association of persons engaged as workers in the industry or employment of maintaining and operating coal mines in Cherokee County, Kansas, including said Mine H, operated by the George K. Mackie Fuel Company, for the purpose of and in the mining and production of coal, for and in common use as fuel for domestic, manufacturing and transportation purposes in the State of Kansas. The said labor union or association of persons was known as District No. 14, United Mine Workers of America. That defendant, Alexander Howat, was at said time an officer and President of said labor union and association of persons and the defendant, August Dorchy, was at said time an officer and Vice-President of said labor union and association of persons. That at said time certain persons, known as Green Pryor, William Coleman, Ab Brown, Horace Dixon, William Richardson, and George Young, and many other persons whose names are unknown to the said Richard J. Hopkins, Attorney General of the State of Kansas, and the said Leo Armstrong, County Attorney, of said Cherokee County, were members of, belonged to and were a part of said labor union or association of persons, in said Cherokee County, Kansas, and were at said time engaged as workers and were employed by the said George K. Mackie Fuel Company at its said Mine H, in said County and State, in the maintenance and operation of said coal mine, know- as Mine H, for the purpose of and in the mining and production of coal for and in common use for domestic, manufacturing and transportation purposes in the State of Kansas.

That on or about the 3rd day of February, A. D. 1921, in said County and State, the defendants, Alexander Howat and August Dorchy, each willfully intentionally, unlawfully and feloniously used

his respective power, authority and influence, incident to his respective position, as an officer in and of said labor union and association of persons, known as District No. 14 of the United Mine Workers of America, as aforesaid, that is the said Alexander Howat as an officer and President of the said Labor Union and association of persons, and the said August Dorchy as an officer and Vice-President of the said labor union and association of persons, and said defendants,
33 Alexander Howat and August Dorchy, did each thereby in said County and State willfully, intentionally, unlawfully and feloniously influence and impel the said Owen Pryor, William Coleman, Ab. Brown, Horace Dixon, William Richardson, and George Young, and said other persons hereinbefore referred to, whose names are hereinbefore averred to be unknown to said Richard J. Hopkins, Attorney General of the State of Kansas, and the said Leo Armstrong, County Attorney of Cherokee County, and who were then engaged as workers in and employed in the maintenance and operation of said coal mine H, for the purpose of and in the production of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in the State of Kansas, to intentionally, willfully and unlawfully conspire with each other and with said defendants in said County and State to, and said persons so influenced and impelled by said defendants, pursuant to and by reason of said influencing and impelling of said defendants and said conspiracy, did intentionally, willfully and unlawfully, cease their work, in maintaining and operating said coal mine for the production of coal therefrom, and said influencing and impelling of said persons by said defendants and said conspiracy acts and conduct of said persons were for the purpose to hinder, delay, interfere with, limit and suspend the operation of said mine for the mining and production of coal for and in common use as fuel for domestic, manufacturing and transportation
34 purposes in the State of Kansas and for the purpose of evading the provisions of Chapter 29 of the Special Session Laws of Kansas, 1920, and to obstruct, hinder and prevent the people of the State of Kansas from living in peace and security, and from being supplied with coal and the necessaries of life. And that such ceasing of work by said persons who ceased work, as aforesaid, was not an individual quitting of employment by any of said persons, or an individual act of said persons, for the purpose of exercising any individual right, but was for the unlawful purpose aforesaid.

All contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Kansas. Richard J. Hopkins, Attorney-General of the State of Kansas. Leo Armstrong, County Attorney of Cherokee County, Kansas.

(Verification omitted.)

Journal District Court, Cherokee County, Kansas, Sitting at Columbus.

May, A. D. 1921, Term, 1 Judicial Day, May 2, '21.

[Title omitted.]

Journal Entry of Pleas.

Now on this 2nd day of May, 1921, the same being one of the regular days of the May A. D. 1921 Term of the above entitled Court, the above entitled cause came on for the arraignment and plea of the above named defendants, to the information filed herein against them, charging the Violating of the Industrial Court Law.

Defendants present, waive the reading of the information and enter plea of Not Guilty, which plea was accepted by the Court and entered of record herein.

No. —.

In the District Court of Cherokee County, Kansas, Sitting at Columbus,

Motion to Quash Information.

[Filed June 27, 1921.]

Come now the defendants above named and appear specially and for the purpose of this motion only and for no other purpose and move the Court to quash the Information filed herein and order the release of the defendants herein for the following reasons, to-wit:

First. That this Court is without jurisdiction of the defendants herein and without jurisdiction of the subject matter set out in the Information filed herein, for the reason that the matters and things set out and charged in said Information, namely that defendants called a strike, do not constitute an offense under the laws of the State of Kansas, and do not, if true, constitute a violation of any lawful valid Statute of the State of Kansas.

That said Information stated no public offense.

Second. That the alleged offense charged in said Information is based upon the Act denoted and known as Chapter 29, of the Session Laws of the Special Session of the Legislature of the State of Kansas, of 1920, which said Act is unconstitutional, invalid and void in this to-wit:

(Alleged Violation of the Constitution of the State of Kansas omitted.)

* * * * * * *

(11) That the said legislative enactment is void and of no effect in that it violates, and is in conflict with Section 2, Article 4 of the

Constitution of the United States, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several states.

(12) That said legislative enactment is void and of no effect in that it violates Article 6 of the Constitution of the United States, which provides that the Constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land and that the judges, in every State shall be bound thereby, anything in the Constitution *of* the laws of any State to contrary, notwithstanding, in that the legislative enactment now in question violates the foregoing provision of the Federal Constitution, and other provisions of the Federal Constitution in pursuance thereof, as herein alleged.

(13) That said legislative enactment violates Article 5 of the Constitution of the United States known as the 5th amendment, which provides "that no person charged with an offense shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

(14) That the said legislative enactment violates Article 9 of the amendments to the Constitution of the United States known as the Ninth amendment, which provides that the enumeration in
37 the Constitution of the United States of certain rights, shall not be construed to deny or disparage others retained by the people.

(15) That said legislative enactment violates section 1 of Article 13 of the amendments to the Constitution of the United States, known as the thirteenth amendment, which provides that neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

(16) That said legislative enactment is unconstitutional and void in that it conflicts with, and is in violation of the terms and provisions of Section 10, Article 1, of the Constitution of the United States which provides: "No state shall pass a law impairing the obligation of contract."

(17) That by reason of the particulars mentioned, said Act is void and of no effect in that it comes within the inhibition of that part of the 14th amendment of the Federal Constitution which reads as follows:

"Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction, the equal protection of the law."

Wherefore, defendants and each of them pray the Court that they be discharged for custody and be permitted to go hence. J. L. Shepard, Phil H. Callery, R. S. Brennan, C. A. McNeill, Chas. Stephens, Attorneys for Defendants.

[File endorsement omitted.]

Journal District Court, Cherokee County, Kansas, Sitting at Columbus.

May Term, A. D. 1921, 47th Judicial Day, June 27, 1921.

[Title omitted.]

Journal Entry of Order Overruling Motion to Quash.

Now on this 27th day of June, 1921, the above cause came on for hearing on the motion of the defendants to quash the information filed herein against them, on which motion defendants' attorney, Redmond S. Brennon, proceeded with the argument, as to why said motion should be quashed. After listening to arguments of said Attorney, and being fully advised in the premises, the Court doth order that said motion should be, and it is hereby overruled, to which ruling the defendants excepted and excepts.

In the District Court of Cherokee County, Kansas, "Sitting at Columbus."

Motion for Peremptory Instructions.

[Filed June 30, 1921.]

Comes now the defendant, August Dorehy, and moves the Court to give a *pre*-emptory instruction to the jury to return a verdict of "Not Guilty," for the reason and upon the grounds that the facts shown by the State are insufficient to prove a public offense.

2nd. For the reason and upon the grounds, stated in the motion to quash the information, which motion is hereby referred to, and made part of this motion for a peremptory instruction the same as if herein re-written and fully set out. J. I. Shepard, Redmond S. Brennon, C. A. McNeill, and Stephens & Dresia, Attorneys for Defendant.

[File endorsement omitted.]

In the District Court in and for Cherokee County, Eleventh Judicial District, State of Kansas, Sitting at Columbus.

[Title omitted.]

Instructions of the Court.

[Filed June 30, 1921.]

GENTLEMEN OF THE JURY: The instruction about to be given you by the Court is the law that will govern you in this case and you are instructed as follows:

1. You are the exclusive judges of all questions of fact in this case, and of the credibility of the witnesses who have testified before you, and the weight you will give to the testimony of each of them. This is peculiarly your province; and it is of the greatest importance that you weigh the testimony carefully, so that you may ascertain the very truth if it is possible to do so. Your finding of facts is the very foundation upon which the judgment of the law must rest, and the Court impresses upon you the importance of a careful unbiased, unprejudiced and intelligent consideration of the testimony.

You are to determine from the appearance of the witnesses on the stand, their manner of testifying their candor and fairness, the degree of intelligence they possess, their interest, if any, in the result of your verdict, their means of knowing the facts concerning which they have testified, their temper, feeling, bias or prejudice, if any has been shown, and from all other circumstances appearing on the trial, which witnesses you will believe, and what weight you will give to the testimony of each. If the testimony of a witness has been fair, is not unreasonable or improbable, is consistent with itself, and the witness has not been impeached, you have no right to disregard such testimony without cause.

If you find any apparent conflicts in the testimony in this case, it is your duty to reconcile all such, and all parts thereof, if reasonably possible, giving to each witness credit for truthfulness; and in thus weighing and attempting to reconcile the testimony, you should take into consideration the opportunities of the respective witnesses to see and know what took place or was said, whether the opportunities of one witness were superior to those of another or others; and whether the intelligence or memory of one witness is superior to those of another or others, but if you can-ot thus reconcile the testimony, then you are to determine and decide for yourselves whom you will believe. In case you find that a witness has deliberately and intentionally, or wilfully and corruptly testified falsely to any material fact in the case, you may disregard and reject the entire testimony of such witness, but you are not obliged to do so, for a witness may be truthful to a portion of his or her testimony and false as to the balance.

2. The information in this case, which was filed in this Court on the 2nd day of May, 1921, charges, in substance, that in the County of Cherokee and State of Kansas, on or about the 3rd day of February, 1921, there was being operated by the George K. Mackie Fuel Company a certain coal mine known as mine II; that said mine was being operated for the purpose of and in the mining and production of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in the State of Kansas. That at said time and prior thereto — existed in said County and State a Labor Union and association of persons engaged as workers in the operation of coal mines in said county, including said mine II, known as District No. 14 of the United Mine Workers of America, and that said defendants, Alexander Howat and August Dorchy, were then and there

officers, to-wit, president and vice-president, respectively, of said labor union and association of persons. That at said time, Owen Pryor, William Coleman, Ab. Brown, Horace Dixon, William Rich-
42 ardson, George Young and many other persons, were members of and belonged to and were a part of said labor union and association of persons, and were at said time engaged as mine workers and employed by said George K. Mackie Fuel Company at said mine II in the maintenance and operation thereof and engaged in the mining and production of coal for domestic, manufacturing and transportation purposes in the State of Kansas. That said defendants Alexander Howat and August Dorchy, being officers of said union and association, as aforesaid, did then and there wilfully, intentionally, unlawfully and feloniously use his respective power, authority and influence and each did thereby and by such means intentionally, wilfully, unlawfully and feloniously influence and impel such persons designated as workers in said mine to wilfully, intentionally and unlawfully cease their work in said mine in producing coal, and said persons did, pursuant to and by reason of said influencing and impelling on the part of said defendants, intentionally, wilfully, and unlawfully cease their said work at said coal mine. It is further charged that said defendants, as such officers of said union or association of persons, did each then and there intentionally, wilfully, unlawfully and feloniously use his respective power, authority and influence incident to such official position and did thereby and by such means influence and impel said workers at said mine II to intentionally, wilfully and unlawfully conspire with each other and with said defendants to, and pursuant to said influencing and impelling
43 and said conspiracy said persons did, intentionally, wilfully and unlawfully quit their work at said mine; and that said influencing and impelling and said quitting of work and said conspiracy acts were for the purpose and intent to hinder, delay, limit and suspend the operation of said mine and for the purpose of evading the purpose and intent of the provisions of said law; and that such ceasing of work by said persons was not an individual quitting of employment or an individual act of said persons for the purpose of exercising any individual right, but was for the unlawful purpose aforesaid.

3. The information in this case, the substance of which has just been given to you, charges the defendants and each of them with the violation of Section 19 of the law creating the Court of industrial relations, in that they, as officers of a labor union or association of persons, influenced and impelled others to violate said law, which is a felony under said section.

There is also included within the allegations of the information the separate and distinct charge of a misdemeanor under the said law, punishable as provided in Section 18 thereof.

4. The defendants, upon being arraigned and required to plead to the information and the charges therein contained, for plea thereto, said that they were not guilty. This plea was entered in their behalf, and it joined issue upon, and puts the State upon proof of every ma-

terial fact alleged against the defendants. And now it is the
41 question of the innocence or guilt of these charges against them, that you are called upon to try, determine and declare by your verdict herein.

The law presumes the defendants innocent of all and each of the offences imputed to them. And they may rest upon this presumption of innocence, they have the right to rest upon it, and following their plea of not guilty, they do rest upon it, and it is a shield and protection to them, without evidence on their part, until it is broken down or overcome and their guilt of some one of the offenses imputed to them, by the information in this case, is established beyond a reasonable doubt, by the evidence in this case. A reasonable doubt, as here used and as used at all times in these instructions, is a doubt which has some reason for its basis, and is that state of the case which, after a full consideration of all the evidence, your minds are left in such condition that you cannot say you feel an abiding conviction to a moral certainty of the guilt of the defendants of the particular charge that you are considering, that is to a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. You should not go beyond the evidence to hunt for doubts, nor entertain them from mere caprice or conjecture. They should arise, if at all, only from a fair, candid and impartial consideration of all the evidence in the case. This rule, with reference to reasonable doubts, must be observed and applied with intelligence. It is not intended to
45 aid any person to escape who is in fact guilty of crime, but is a humane provision of law, intended, so far as human agencies can, to guard against the danger of any innocent person being unjustly punished.

5. In this action the defendants are charged with the violation of what is known as the law creating the court of industrial relations, being chapter 29 of the laws of the State of Kansas of the Special Session of 1920; and I now quote you certain sections and parts of sections of said law deemed material to the issues in this case:

Section 3 provides in part as follows:

"The operation of the following named and indicated employments, industries, public utilities and common carriers is hereby determined and declared to be effected with a public interest and therefore subject to the supervision of the State as herein provided for the purpose of preserving the public peace, protecting the public health, preventing industrial strife, disorder and waste, and securing regular and orderly conduct of the business directly effecting the living conditions of the people of the state and in the promotion of the general welfare, to-wit—(3) The mining or production of any substance or material in common use as fuel either for domestic, manufacturing, or transportation purposes; * * *

Any person, firm or corporation engaged in any such industry or employment * * * within the State of Kansas, either in the capacity of owner, officer, or worker, shall be subject to the provisions of this act, except as limited by the provisions of this act."

Section 17 provides in part as follows:

"It shall be unlawful for any person, firm or corporation, or for any association of persons, to do or perform any act forbidden, or to fail or refuse to perform any act or duty enjoined by the provisions of this act, or to conspire or confederate with others to do or perform any act forbidden or to fail or refuse to perform any act or duty enjoined by the provisions of this act, or to induce or intimidate any person, firm or corporation engaged in any of said industries, employments, utilities or common carriers to do any act forbidden, or to fail or refuse to perform any act or duty enjoined by the provisions of this act, for the purpose or with the intent to hinder, delay, limit or suspend the operation of any of the industries, employments, utilities or common carriers herein specified or indicated, or to delay, limit or suspend the production or transportation of the products of such industries, or employments, * * * Provided, That nothing in this act shall be construed as restricting the right of any individual employee engaged in the operation of any such industry, employment, public utility, or common carrier to quit his employment at any time, but it shall be unlawful for any such individual employee or other person to conspire with other persons to quit their employment or to induce other persons to quit their employment for the purpose of hindering, delaying, interfering with, or suspending the operation of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act, * * *

Section 18 of the act provides in substance that any person wilfully violating the provisions of this act shall be deemed guilty of a misdemeanor and shall be punished by a fine not to exceed $1,000.00, or by imprisonment in the County Jail for a period not to exceed one year, or by both such fine and imprisonment.

Section 19 of the acts provides:

"Any officer of any corporation engaged in any of the industries, employments, utilities or common carriers herein named and specified, or any officer of any labor union or association of persons engaged as workers in any such industry, employment, utility or common carrier, or any employer of labor, coming within the provisions of this act, who shall wilfully use the power, authority or influence incident to his official position, or to his position as an employer of others, and by such means shall intentionally influence, impel, or compel any other person to violate any of the provisions of this act, or any valid order of said Court of Industrial Relations, shall be deemed guilty of a felony and upon conviction thereof in any court of competent jurisdiction shall be punished by a fine not to exceed $5,000.00, or by imprisonment in the state penitentiary at hard labor for a term not to exceed two years, or by both such fine and imprisonment."

6. You are instructed that under the law and the evidence in this case the chief inquiries for you to make and which you must answer by your verdict, as to the felony charge against the defendants under Section 19, previously quoted, are:

First. Where the defendants, Alexander Howat and August Dorcy, at the County of Cherokee and State of Kansas, on or about the 3rd day of February, 1921, officers, to-wit, president and vice-president, respectively, of the labor union or association of persons known as District No. 14, United Mine Workers of America?

Second. If so, did said defendants then and there as such officers, respectively, wilfully use their respective power, authority, or influence incident to such official positions, respectively, and by such means thereby unlawfully and feloniously, intentionally influence or impel other persons, designated in the information as workers employed at said mine II, to violate any of the provisions of said law, as alleged and in the manner charged in the information in this case?

And if from the evidence and beyond a reasonable doubt
48 you answer these inquiries and each of them in the affirmative, then you should convict the said defendants of the felony charge under section 19 of said law, as charged in the information; but if you do not so find from the evidence and beyond a reasonable doubt that each and all of the elements necessary to constitute such offense existed at the time in question, then you should acquit said defendants of that charge.

7. In order to warrant a conviction of the defendants on the felony charge the jury must find from the evidence beyond a reasonable doubt that said defendants were officers of the labor union in question, and that, as such officers, they wilfully used their power, authority or influence incident to such official positions, and by such means thereby intentionally influenced or impelled other persons to violate one or more of the provisions of said law creating the court of industrial relations.

8. One of the questions for you to determine in this case is: Did the employees at mine II cease their work thereat in such a manner and under such circumstances as to constitute a violation of law? And in this connection you are instructed that if the said employees quit their said employment singly as individuals and without any agreement among themselves to cease said work collectively and as a body, then their action in ceasing such work would not constitute a violation of said law; but if said parties or two or more of them quit their work pursuant to an agreement and conspiracy among
49 themselves to cease said work collectively for the purpose of hindering, delaying, interfering with or suspending the operation of said mine, and that said mine was then and there engaged in the mining or production of coal in common use as fuel for domestic, manufacturing or transportation purposes in the State of Kansas, then said persons so agreeing and conspiring and ceasing their work pursuant thereto, as aforesaid, would be guilty of the violation of said act.

9. If you should find from all the evidence in the case beyond a reasonable doubt that within the county of Cherokee and state of Kansas and at or about the time alleged in the information there was being operated by the George K. Mackie Fuel Company a certain coal mine known as mine II, and that said mine was in operation for the

purpose of and in the mining and production of coal for common use as fuel for domestic, manufacturing or transportation purposes in the State of Kansas; and that at said time there existed in said county and state a labor union or association of persons engaged in the operation of said mine as workers, and said union being known as District No. 14 of the United Mine Workers of America; and that at said time the defendants, Alexander Howat and August Dorchy, were members and officers of said union and association; and that at said time the persons named in the information or other persons disclosed by the evidence were members of said labor union or association and that such persons were engaged as mine workers and em-
50 ployed by the said George K. Mackie Fuel Company at said mine H in the maintenance and operation thereof and in the mining and production of coal therefrom; and that at about the time alleged in the information the said defendants, Alexander Howat and August Dorchy, as officers of said union or association, or either of them, did then and there wilfully, intentionally, unlawfully and feloniously use his respective power, authority or influence as such officer and did thereby and by such means in said county and state intentionally, unlawfully and feloniously influence or impel the said persons designated as workers in said mine, or two or more of them, to conspire with each other and with the defendants to quit their employment at said mine for the purpose of hindering, delaying, interfering with or suspending the operation of said mine in the mining and production of coal, and that the said persons in pursuance of such influencing or impelling and of such conspiracy, quit their said work at said mine for the purpose of hindering, delaying, interfering with or suspending the operations of said mine, and thereby hindered, delayed, interfered with or suspended the operation of said mine in the mining and production of coal therefrom for use as fuel for domestic, manufacturing or transportation purposes in the state of Kansas, then and in that event you should find such defendant or defendants guilty of the felony charge contained in the information; but if you do not so find, then you should acquit said defendants of that charge.

51 10. You are instructed that a conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or an unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means.

To constitute a conspiracy there must be a unity of design and purpose among the several persons to accomplish the unlawful act, and there can be no conspiracy without such common design and purpose. Mere knowledge, acquiescence or approval of the act, without co-operation or agreement to co-operate, will no- be sufficient to constitute one a party to such conspiracy.

However, while there must be such common design and agreement between the parties, no formal agreement is necessary nor is any express agreement, either oral or written, required; and it is sufficient if the minds of the parties meet understandingly so that they intelligently and deliberatly agree to do the act or acts, although there

Minnesota State

may be no formal words, either written or oral, or express agreement; and a mutual implied understanding and assent that each and all are to do the act or acts required of them in furtherance of the common design and purpose, is sufficient to constitute the required combination or agreement.

And if you find from the evidence beyond a reasonable doubt that said mine H was one of the industries covered by and within the said law, and that two or more of the employees at said mine quit their work thereat for the purpose of hindering, delaying, interfering with or suspending the operation of said mine; and if you further find that at the mine of so quitting their said work there was a common mutual agreement, understanding and design among them that they would so quit their work for the purpose aforesaid, then you are instructed that this would constitute conspiracy on the part of those having such mutual understanding and design.

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11. Several terms are used in the law and these instructions *which* should be defined to you and they are severally defined as follows:

The word "influence" means to control or move by an efficacious power, physical or moral; to persuade; to lead.

The word "impel" means to urge forward; to incite to action in any way; to instigate or induce.

The words "influence" and "impel," as used in section 19 of the statute quoted, signify a consum-ated effort; that is, the parties alleged to have been influenced or impelled must be shown to have yielded to such influence or impelling force.

The word "wilfully" means purposely or designedly, proceeding from a conscious motion of the will as distinguished from accidentally or involuntarily.

The word "intentionally" means by design or of purpose.

Both terms "wilfully" and "intentionally," as used in the statute, import unlawful purpose.

12. Some evidence has been introduced tending to show that the purpose in ordering or requesting the employees at said mine H to cease work and the purpose of said employees in ceasing work was to obtain or force a settlement of a wage controversy between one Carl Mishmash and the said fuel company; and you are instructed that if the said defendants did influence or impel said employees to cease their work, and said employees, pursuant thereto, did in fact cease their work at said mine, for the purpose of hindering, delaying, interfering with or suspending the operation of said mine, then the fact that the ultimate object or purpose of said defendants and said employees was to obtain or force a settlement of such wage controversy would be no defense to this action.

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In other words, if the purpose of the defendants and said employees was to suspend or stop the operation of said mine and thereby force collection of said wage claim, then the fact that it was their purpose to force payment of such claim would be no defense.

13. Under the charge in the information in this case you may convict or acquit either or both of the defendants, and they may be convicted on either the felony or misdemeanor charge, or one may be

convicted on one and the other on the other charge, as you find the facts to be under the evidence and these instructions. But before you can convict either of said defendants of either of said offenses you must find and believe from the evidence and beyond a reasonable doubt that each and all of the elements necessary to constitute such particular offense existed as to such particular defendant.

14. It is alleged in the information that the offense was committed or on about February 3, 1921; however, the exact date of time is immaterial, and if it is shown beyond a reasonable doubt that the identical offense charged was committed at a time different than that charged, conviction may be had, provided such offense was committed prior to the commencement of this prosecution on February 17, 1921 and subsequent to January 24, 1920, the time the law in question took effect.

15. It is charged in the information that the defendants did unlawfully use their respective power, authority and influence as officers of said labor union and did thereby impel and influence other persons, a part of them being designated by name, to violate the law by ceasing work. You are instructed that the fact that some or all of such persons so designated were not actually engaged in said mine would not in and of itself warrant a verdict of not guilty if the evidence shows beyond a reasonable doubt that any persons so engaged in said mine as workers were so influenced or impelled to violate said law by ceasing work as elsewhere explained.

16. You are instructed that under said act and within the meaning of the law any person whose work is necessary or convenient part of the operation of a coal mine as a whole, is so considered as a worker in the operation of such mine and producing coal therefrom.

17. Before you can convict the defendants of any charge contained in the information you must find and believe from the evidence beyond a reasonable doubt that at the time in question the mine alleged, to-wit, mine 11 of the Mackie Fuel Company, was one of the industries or employments covered by and within the said law; and in order to so find it must be shown that said mine was being operated for the purpose of and in the mining or production of coal in common use as fuel either for domestic, manufacturing or transportation purposes, and that it was being so operated in Cherokee County, Kansas, and that a part or all of such coal was for such use within the state of Kansas.

18. You are further instructed that the mere fact that the said mine 11, of the George K. Mackie Fuel Company, had not been operated for a period prior to the ceasing of work by the employees thereof, if such be the fact, would not in and of itself warrant the jury in finding that the action of the defendants in calling the strike aforesaid, if you so find, did not hinder, delay, interfere with or suspend the operation of said mine, provided you further find that at the time the workers engaged at said mine ceased work, the said mine was open and ready for operation and that it would have been operated but for the acts of defendants in ordering or requesting said workers to cease work and the compliance of such workers with such order or request.

19. If you should a-quit the defendants, or either of them, on the felony charge contained in the information, then as to such defendant or defendants you will inquire as to their guilt or innocence
56 under the misdemeanor charge, and may convict or acquit, as you find the facts to be, under the two instructions immediately following.

20. If you find beyond a reasonable doubt that in Cherokee County, Kansas, on or about the time alleged in the information, the said mine M was an industry covered by and within said law as previously explained, and that some or all of the persons alleged in the information or shown by the evidence were then and there employees of said fuel company and engaged as workers in said mine H, and that the said defendants, or either of them, did then and there wilfully and unlawfully induce some or all of said persons to quit their said employment, for the purpose of hindering, delaying, interfering with or suspending the operation of said mine, then you should find said defendant or defendants guilty of a misdemeanor which is punishable according to the terms of section 18 of said law;

21. Or, if you find beyond a reasonable doubt that in Cherokee County, Kansas, on or about the time alleged in the information, the said mine H of said fuel company was an industry covered by and within said law, and that some or all of the persons alleged in the information or shown by the evidence were then and there employees of said fuel company and engaged as workers in said mine, and that said defendants or either of them did then and there wilfully and unlawfully conspire with said workers or some of them to quit their employment, and pursuant thereto such persons did quit such
57 employment, and that such conspiracy and such quitting of work were for the purpose of hindering, delaying, interfering with or suspending the operation of said mine, then you should find said defendant or defendants guilty of the misdemeanor charge; but if you do not find as indicated in either this or in the next preceding instruction, then you should acquit said defendant or defendants as the case may be.

22. You are instructed that our statute governing criminal procedure provides that "if the accused shall not avail himself of his right to testify in any case, it shall not be construed to affect his innocence or guilt." In this case the defendants did not avail themselves of their right to testify, but you are instructed that they are not obliged to testify and the fact that they have not done so should not be taken by you as any presumption of guilt and you should not take the same into consideration in deliberating upon your verdict.

23. You are further instructed that if any one of the jury, after having considered all the evidence in the case and consulted with his fellow jurors, should entertain a reasonable doubt of the guilt of the defendants or defendant, then the jury cannot convict such defendants or defendant, so long as any juror entertains such reasonable doubt.

23½. If you should find and believe from the evidence, beyond a reasonable doubt, that the defendants are guilty of some offense

harged in the information, either the felony or misdemeanor, but entertain a reasonable doubt as to the particular one of such offenses the defendants are guilty, then you should resolve such doubt in favor of said defendants and convict only of he lesser charge and that concerning which you entertain no reasonble doubt.

24. And now, gentlemen of the jury, the court impresses upon you he importance of a careful consideration of this case and the duty hich rests upon you as jurors. This impress of duty you should arry with you into your jury room and retain throughout your deberations. No matter outside of the law and the evidence in the se can have any proper place in your deliberations. No juror hould permit his idea of what the laws should be, or whether the laws e good or desirable or otherwise, to influence or prejudice him in he least, one way or the other, but the verdict of the jury should be ased solely upon the law as it exists and the evidence as it came to at in the trial of this case.

When you shall have retired to the jury room select one of your umber to serve you as foreman, and when a verdict is reached sign it s your foreman and return it into open court. Proper forms if verict will be submitted to you in accordance with these instructions.

Dated this 30th day of June, 1921, and given to the jury on said ate. F. W. Boss, District Judge.

[File endorsement omitted.]

In the District court of Cherokee County, Kansas, Sitting at Columbus.

[Title omitted.]

Verdict.

We, the jury duly empaneled and sworn to try the issues joined in e above entitled cause, do on our oaths find the defendant, August rchy, guilty of a misdemeanor in that said defendant did wilfully nder, delay, limit and suspend the operation of coal mine H of the orge K. Mackie Fuel Company in violation of Chapter 29 of the ws of Kansas of the Special Session, 1920; committed all in manner d form as charged in the information in this case. W. B. Davies, reman.

In the District Court of Cherokee County, Kansas, Sitting at Columbus.

[Title omitted.]

Journal Entry of Judgment.

[Filed July 27, 1921.]

STATE OF KANSAS,
Cherokee County, ss:

60 Pleas and Proceedings in the District Court of the Eleventh Judicial District of the State of Kansas, Sitting at the City of Columbus, Within and for Cherokee County, in said State, at the May Term Thereof, Begun and Held in said County and State, Commencing on the 2nd Day of May, A. D. 1921, as by Statute Required.

Present: The Honorable F. W. Boss, District Judge of the said Eleventh Judicial District of said State; William Harvey, Sheriff of said County, and C. E. Rumery, Clerk of said Court, within and for said County.

Now on this 27th day of June, 1921, the same being one of the regular days of the May 1921 term of the Eleventh Judicial District — of the State of Kansas, came on for hearing the above entitled action. The State of Kansas, plaintiff, appearing by Richard J. Hopkins, Attorney-General of Kansas, C. B. Griffith and J. G. Egan, Assistant Attorney Generals of the State of Kansas, and Leo Armstrong, County Attorney of Cherokee County, Kansas, and the defendants Alexander Howat and August Dorchy, appearing in person and by their attorneys, J. I. Sheppard, Redmond S. Brennan, James Callery, C. A. McNeill, Charles Stephens and Frank E. Dresia. Both plaintiff and defendants announce to the Court they are ready for trial; thereupon the defendants ask leave of the Court to withdraw their pleas of not guilty heretofore made herein on the 2nd day of May, 1921, which leave was, by the Court, granted, after which the defendants filed a Motion to Quash the Information filed
61 herein, which motion was, by the Court after hearing said motion and the arguments of counsel, overruled. Thereupon the defendants, waive arraignment and entered their pleas of not guilty. Thereupon, the jury was called and the empanelling thereof begun, and was proceeded with until noon, at which time the Court, after admonishing the jurors, swore Deputy Sheriff, Thomas J. Harvey, as Bailiff, and ordered him to take charge of the jurors. Court was then adjourned until 1:30 P. M. of said day. At 1:30 P. M. of said day, said Bailiff returned into Court with the jurors and the empanelling of the jury was proceeded with until 5:00 o'clock P. M., at which time the Court, after admonishing the jurors, again placed them in charge of said Bailiff, Deputy Sheriff, Thomas J. Harvey,

and adjourned Court until 9:00 o'clock, Tuesday morning, June 28, 1921.

At 9:00 o'clock A. M. on said last named date, Bailiff returned into Court with the jurors and the empanelling of the jury was proceeded with until 4:05 o'clock p. m., at which time the Court, after admonishing the jurors and placing them in charge of the Bailiff, Thomas J. Harvey, took an adjournment until 9:00 o'clock A. M., June 29, 1921.

At 9:00 o'clock A. M. on said last named date, the Bailiff returned into Court with the jurors and the empanelling of the jury was proceeded with and completed. The jury was then sworn by the Clerk of the Court to try the case. Counsel for both plaintiff and defendants make their opening statements, after which the State offers its evidence in part. At 5:00 o'clock P. M. the jury is admonished and place- in charge of Bailiff, Thomas J. Harvey, and Court adjourned until 9:00 o'clock A. M., June 30th, 1921.

At 9:00 o'clock A. M. June 30th, said Bailiff returned into Court with the jurors. Both defendants are present in person and by their attorneys. The State offers the balance of its evidence and rests their case. The defendants introduce no evidence and thereupon rest their case. The jury is instructed by the Court and the case argued by attorneys for the State and attorneys for the defendants, after which the jury retired to deliberate upon the verdict in charge of Bailiff Thomas J. Harvey.

The jury returns into open Court in charge of the Bailiff at 2:15 o'clock P. M., July 1, 1921, with their verdicts finding each of the defendants guilty of a misdemeanor. Said defendants Alexander Howat and August Dorchy, being present in person and by their attorneys. Each of the verdicts are read by the Clerk of the Court, after which the Jury is discharged by the Court. Sentence Day for said defendants is by the Court, set for July 8th, 1921, and said defendants permitted to go on the present bonds and commanded to appear for sentence at 9:00 o'clock A. M. on said last named date.

And now on this 8th day of July, 1921, at a regularly adjourned day of said term of Court, this cause came on for the judgment and sentence of the Court against the defendants Alexander Howat and August Dorchy, upon the verdicts of guilty heretofore found against them herein by the jury, upon the Information filed against them herein charging violation of the provisions of Chapter 29, Laws of Kansas of 1920, entitled: "An Act creating the Court of Industrial Relations, defining its powers and duties, *and duties*, and relating thereto, abolishing the public Utilities Commission, repealing all acts and parts of acts in conflict therewith, and providing penalties for the violation of this act," and thereupon the State appears by C. B. Griffith, Assistant Attorney General of the State of Kansas, and Leo Armstrong, County Attorney of Cherokee County, Kansas, and by the order of the Court, the defendants appear in Court in their own proper person and by their attorneys, J. I. Sheppard, James Callery, C. A. McNeill, Charles Stephens and Frank E.

Dresia. A motion for New Trial in this cause heretofore filed herein on the 1st day of July, 1921 and affidavit of jurors are submitted to the Court without argument, which Motion is, by the Court overruled. And the defendants being now caused to stand before the Court, are informed by the Court of the Verdicts of Guilty heretofore found against them herein, on said information filed against them herein by the said Richard J. Hopkins, Attorney General and Leo Armstrong, County Attorney aforesaid, and each is asked by the Court whether he has any legal cause to show why judgment and sentence of the Court should not be pronounced against them upon the said verdicts of guilty herein, and after listening to each of said defendants no sufficient cause being alleged by the defend-
64 ants, or appearing to the Court why judgment should not be pronounced.

It is therefore, Now by the Court here considered ordered, and adjudged that the said defendants, Alexander Howat and August Dorchy, be and they are hereby sentenced to confinement to the County Jail of Cherokee County, Kansas, each for the period of six months and that each pay a fine unto the State of Kansas in the sum of $500.00, and that they pay the costs of the prosecution herein against them, taxed at $488.00, and that they be and are hereby committed until said costs and fines are paid. Execution is stayed sixty days in which for defendants to prepare appeal, and bonds are fixed for each defendant. An appearance Bond for each defendant is fixed at $2,000.00; Bond not to Violate said Law for each defendant is fixed at $2,000.00. Defendants are, by the Court, permitted to go on their present bond during the stay of execution. F. W. Boss, Judge of the District Court.

[File endorsement omitted.]

65 In the District Court of Cherokee County, Kansas, Sitting at Columbus.

[Title omitted.]

Motion for New Trial.

[Filed July 1, 1921.]

Comes now the above named defendants, and each of them, and moves the court to set aside the verdict rendered against them, and each of them, and to grant to each of said defendants, a new trial, for the reason and upon the grounds following, to-wit:

1st. Illegal testimony admitted on the trial by the Court.

2nd. Exclusion of testimony sought to be elicited by the defendants, and each of them upon cross examination, on the trial of said case.

3rd. Newly discovered evidence of the defendants, which they could not with reasonabale diligence, have at the time of the trial.

4th. Misconduct of the attorneys for the state.

5th. Misconduct on the part of the jury, after they had retired to deliberate upon the verdict, tending to prevent a fair and due consideration of the case. And because the jury did not believe a crime was committed.

6th. Because the verdict has been decided by means other than a fair expression of opinions on the part of all the jurors.

7th. Because the Court misdirected the jury in matters of law.

8th. Because the instructions are contrary to law.

9th. Because the verdict is contrary to law.

10th. Because the verdict is contrary to evidence.

11th. Because the information in this case does not state facts sufficient to constitute a public offense.

12th. Because the law under which the defendants and each of them were prosecuted is unconstitutional and void, as set out in the defendants' motion to quash the information, which motion is hereby referred to and made a part of the defendants' motion for new trial, the same as if fully re-written herein, and set out.

13th. Because of erroneous rulings of the court during the selection of the jury and the opening statements and throughout the trial. Affidavits and other evidence will be offered at the hearing hereof.

14th. Error in sustaining the State-' challenge to jurors because they were members of the miners' union over objections of defendants.

15th. Error in keeping the jury together throughout the trial contrary to the usual custom in such case. C. A. McNeill, J. I. Shepard, Stephens & Dresia, Attorneys for Defendants.

[File endorsement omitted.]

Journal District Court, Cherokee County, Kansas, Sitting at Columbus.

May, A. D. 1921, Term, 56th Judicial Day, July 8, 1921.

[Title omitted.]

Journal Entry Overruling Motion for New Trial.

Now on this 8th day of July, the same being one of the regular court days of the May, 1921, term of the District Court, the above cause came on for hearing on defendants' motion for a new trial herein. Both parties appeared by their respective counsel, and after hearing the arguments of counsel, and being fully advised in the premises, the court doth overrule said motion, and denies the defendants and each of them a new trial herein, to which ruling defendants duly excepted and excepts. F. W. Boss, Judge.

68 In the District Court of Cherokee County, Kansas, Sitting at Columbus, in said County.

No. —.

[Title omitted.]

Notice of Appeal.

[Filed Feb. 6, 1922.]

To the above named plaintiff, The State of Kansas, and Leo Armstrong, County Attorney of Cherokee County:

The above named plaintiff, The State of Kansas, and Leo Armstrong, County Attorney of Cherokee County, Kansas, are hereby notified that the above named defendants, Alexander Howat and August Dorchy, appeal from the Court's findings of fact and conclusions of Law, and appeal from the judgment and sentence of the above entitled Court hereinbefore made and entered in the above entitled case on the 8th day of July, 1921, in which judgment was rendered by said Court in favor of said plaintiff and against said defendants and in which judgment and sentence was passed by the said Court upon said defendants upon said date; and the said defendants, Alexander Howat and August Dorchy, appeal from said judgment and sentence as follows, to-wit:

First. From the order and judgment of the Court in overruling defendants' motion to quash the information filed herein.

69 Second. From the order, judgment and ruling of said Court excluding coal miners from qualifying as jurors to try said case.

Third. From the order and judgment of the Court in overruling defendants' objection to the introduction of any testimony in the case.

Fourth. From the order and judgment of the Court in overruling defendants' demurrer to the state's evidence and motion for the discharge of the said defendants.

Fifth. From the order and judgment of the Court in overruling defendants' motion for a new trial.

Sixth. From the order and judgment of the Court in overruling defendants' motion in arrest of judgment.

Seventh. From the order and judgment of the Court requiring the defendants to execute to the State of Kansas a bond to not again violate the law, under which their conviction was had, pending an appeal from said conviction herein.

Eighth. Defendants predicate their appeal herein solely upon the error of the Court in the rulings, orders and judgments only as such rulings, orders and judgments constitute error as relates to the Constitution of the United States and the laws of the United States. And defendants raise no question of error as it relates to the Constitution

ed laws of Kansas. Phil Callery, J. E. Callery, Attorneys for De-endants.

I, the undersigned attorney of record for the plaintiff above named, acknowledge service of a copy of the above and foregoing Notice of Appeal on me this 6th day of February, 1922. Leo Armstrong, Attorney for Plaintiff, County Attorney of Cherokee County, Kansas.

[File endorsement omitted.]

In the District Court of Cherokee County, Kansas, Sitting at Columbus.

[Title omitted.]

Journal Entry on Appeal Bonds.

[Filed Feb. 8, 1922.]

Now on this 6th day of February, A. D. 1922, the *the* same being ne of the regular days of the January, 1922, term of above named urt, came on for approval the Bonds for Appeal of the above enti-ed cause to the Supreme Court of the State of Kansas, defendants ing present by their attorney, Phil Callery. After having filed eir notice of appeal and serving Leo Armstrong, County Attorney Cherokee County, Kansas, one of the attorneys for the plaintiff, h a copy thereof, and after having given a bond in the sum of $2,-0.00 not to violate the law under which the conviction was had, ding the appeal, and a Bond in a sum double the amount of the e and costs in said case, which Bonds were, after a satisfactory ex-ination of the sureties thereon, *were*, by the Clerk of the District urt of Cherokee County, Kansas, approved. After which the Ap-rance Bond is presented to the Hon. F. W. Boss, Judge of the ve named Court, and after being advised as to the financial respon-sibility of the sureties thereon and that all other things neces-sary to perfect said appeal had been complied with, doth ap-prove said Appearance Bond and further execution of said dgment and sentence is hereby stayed pending said Appeal. F. W. s, Judge District Court.

[File endorsement omitted.]

In the District Court of Cherokee County, Kansas, Sitting at Columbus.

[Title omitted.]

Clerk's Certificate.

STATE OF KANSAS,
Cherokee County, ss:

I, C. E. Rumery, Clerk of the District Court within and for the County and State aforesaid, do hereby certify the above and foregoing to be a true and correct copy of the Entire record in case of State of Kansas vs. Alexander Howat and August Dorchy, except the Precipes for Subpœnas and the subpœnas issued, as the same appear and remain of record in my office in the City of Columbus, said County and State.

Witness my hand and official seal this 20th day of December, A. D. 1921. C. E. Rumery, Clerk of the District Court of Cherokee County, Kansas. [Seal.]

72 **Abstract of the Testimony.**

The Strike Order in question which was not disputed or denied by Appellant, was introduced in evidence by Assistant Attorney General, Chas. Griffith, as follows:

By Mr. Griffith: I now desire to introduce exhibit "A" in evidence and read same to the jury. No objection. Received in evidence and read to the jury, as follows:

Exhibit "A."

Pittsburg, Kansas, February 3, 1921.

To the men employed at the mines of the Mackie Fuel Company:

This is to advise you that we are authorized and directed by our executive Board to notify you to cease work beginning Friday Morning, February 4, 1921, until such time as the company pays Brother Carl Mishmash the amount of money due him in accordance with the settlement made by the Joint Board of miners and operators in this case. This case has been settled by the Joint Board of Miners and Operators, but the company refuses to comply with the settlement that has been made and refuses to pay Brother Mishmash any part of the money that is due him.

We sincerely hope that the men employed at the mines of this company will respond to the call of duty and stand united as one man until such time as this company carries out the agreement that has been made by the Joint Board of Miners and Operators. When

we make a satisfactory settlement of the question in dispute
73 you will be notified from this office of the same.
With kind regards, we are, Yours very truly, Alexander Howat, President District No. 14. August Dorchy, Vice President.

Cross-examination of the witness, GEORGE YOUNG.

By Mr. Shepherd:

Q. This information says you men wilfully and intentionally quit your work upon receipt of this order for the purpose of evading the provisions of this law. Did you do any such thing as that or did you quit for the purpose of collecting the Mismash money?

—. ——.

Q. Did you do that for any other purpose than to collect this money for Mishmash?
A. They done that to collect the money for Mishmash.
Q. And no other purpose?
A. No, sir.

Redirect examination.

By Mr. Griffith:

Q. Mr. Young, you knew when you read that order and quit that morning that the operation of that mine would cease, did you not?
A. Yes, certainly.
Q. And it did stop?
A. Yes, sir.

GEORGE JENKINS, being first duly sworn, upon oath, testified as follows:

Direct examination.

By Mr. Griffith:

Q. State your name.
74 A. George Jenkins.
Q. Where do you live?
A. Scammon, Kansas.
Q. What is your business?
A. Mine Foreman, Mine H.
Q. What was your business on or before February 4, 1921.
A. Mine foreman.
Q. At what mine?
A. Mackie H, Mackie Fuel Company.
Q. You say the George K. Mackie Fuel Company?
A. Yes, sir.
Q. Were you working at this mine as mine foreman?
A. Yes, sir.
Q. On the 3rd of February and prior thereto?

A. Yes, sir.

Q. Can you state to the jury at this time, whether or not that mine was operated on February 3, 1921?

A. Yes, we worked on the 3rd of February.

Q. How many men did you have employed at that mine at that time?

A. Something in the neighborhood of 45 or 6 men.

Q. What time did you get to the mine on the morning of February 4, 1921?

A. Twenty minutes to seven or six thirty, something like that.

Q. Did you see any of them, the men that had been employed there the day before, at the mine that morning?

A. Yes, sir.

75 Q. How many men did you see there?

A. I think I saw most of them. I did not pay much attention to who I did see.

Q. Have you a list of the men who worked in the mine at that time?

A. Not with me.

Q. Where is that list?

A. I have a part of the list, all the day men, but not the miners.

Q. What do you mean by the day men?

A. Day work. Work by the day, so much per day, and the miners work by the ton.

Q. When you got to the mine on February 4th, were any of the men leaving?

A. Immediately after I got there they started leaving.

Q. Do you know whether they came there with their dinner buckets or not?

A. Yes, sir.

Q. What, if anything, did they take with them when they left the mine?

A. Nothing but their buckets back again.

Q. Did you talk with any of these men at that time?

A. I was waited on by the pit committee. One of the committee and the president of the local.

Q. And who was the pit committeeman and the other man who waited on you?

A. Mr. George Young and John McNally.

Q. Is Mr. George Young the man who was on the witness stand prior to you?

76 A. Yes, sir.

Q. Who was the other man?

A. John McNally.

Q. What relation did he have to the mine?

A. Both worked there. One worked as a miner and the other as a day man.

Q. What, if anything, did Young or McNally say to you?

A. Notified me there would be no more work there until the case of the Mishmash boy had been settled.

Q. You run on February 3, 1921. What happened on the morning of the 4th of February?
A. I was waited on by the committee.
Q. With reference to the men what happened?
A. They went home.
Q. How many men were employed by the mine on February 3?
A. About 45 or 46.
Q. How many men work in the ground?
A. I cannot give it accurately.
Q. About?
A. About 28 or 26.
Q. After the 4th, you may state whether or not that mine was idle?
A. It was idle until the 9th, I think.
A. We blew for work on the morning of the 4th and 5th.
Q. What was the custom with reference to blowing the whistle in the morning at that time?
A. Had certain signal for work and for no work.
Q. What for work? What was the signal for work?
A. Three long whistles and two short.
Q. On the 5th, 6th and 7th of February, you may state whether or not the whistles blew?
A. The whistle blew for work on the 5th and not any more until the 8th, I don't think.
Q. On the 5th, did anyone come to work?
A. No, sir.
Q. On the 8th, you say the whistles blew again?
A. Yes, I think they blew for work on the 8th.
Q. Did anybody come on the 8th?
A. I don't think so.
Q. Do you remember what day of the week the 8th was?
A. No, sir, I don't remember.
Q. What about the 9th?
A. The 9th, they came to work and cleaned up.
Q. You say they came to work. Who do you mean?
A. All the diggers and day hands.
Q. State whether or not any of the men there on the morning of the 4th of February came to work on the 9th.
A. Yes, all of them came and cleaned up.
Q. State, if you know, how many.
A. All the diggers were there and cleaned up, but one man.
Q. How many men that were there on the 3rd and the morning of the 4th that came back on the 9th?
A. I don't know the accurate amount of the diggers there was. There was 18 day men.
Q. Did some of the men who worked there on the 3rd and came back on the 4th, work on the 9th?
A. Yes, all but one.
Q. On the 9th what, if anything, was done?
A. They worked.
Q. In what way, what did they do?
A. Cleaned up the coal.

Q. When was the next time any work was done in Mine II?
A. I think the 23rd day of February.
Q. The mine was idle from the 3rd to the 9th and from the 9th to the 23rd?
A. Yes, sir.
Q. And on the 23rd, who came back to work?
A. All the same ones that left on the 9th, they all came back on the 29th,
Q. Then was the mine operated after that?
A. Yes, sir.

Cross-examination.

By Mr. Sheppard:

Q. As I understand it, two men came to you, Mr. Young and Mr. McNally?
A. Yes, sir.
Q. And told you that there would be no work until the company paid young Mishmash?
A. Yes, sir.
Q. Do you remember how much that was?
A. No, I don't remember.
Q. The men told you they would not go to work until they got this money?
A. The committee told me.
79 Q. And did they go to work as soon as the payment was made?
A. Before, one day.
Q. They went to work on the 23rd?
A. Yes, sir.
Q. When was the money paid?
A. I don't know exactly.
Q. Was it paid at that time?
A. In that month, I think. Some time in that month.
Q. When the company made arrangement to pay it, they went to work, did they?
A. Yes, sir.
Q. You knew why they quit?
A. Yes, sir.
Q. You were what is known, Mr. Jenkins, in the mining game, as a company man and you did not belong to the union at that time?
A. No, sir.

GEORGE YOUNG, recalled, testified as follows:

Redirect examination.

By Mr. Griffith:

Q. You stated in reply to a question asked by Mr. Sheppard that the reason the men quit work there was for the purpose of collecting the Mishmash claim?

A. Yes, sir.
Q. How did you expect to collect the Mishmash claim by stopping ork?
A. That is the only way of getting it. Only way we could get it, striking for it.

Cross-examination.

By J. I. Sheppard:

Q. One question. You quit, you say, because they would not pay the money. You would have gone to work that very day, immediately, if they had paid the money?
A. If he had had the money that morning, we would have gone work.
Q. Any day they paid it?
A. Yes, sir.
Q. You did go to work immediately after they paid it, did you?
A. Yes, after they did pay it.

JACK MORTON, being first duly sworn, upon his oath, testified as llows:

Direct examination.

By Mr. Griffith:

Q. Your name is Jack Morton?
A. Yes, sir.
Q. Where do you live?
A. Scammon, Kansas.
Q. In Cherokee County.
A. Yes, sir.
Q. What is your occupation?
A. Mine superintendent for the Geo. K. Mackie Fuel Company.
Q. Were you mine superintendent of that company during the inter of 1920 and 1921?
A. Yes, sir.
Q. At their mine located northwest of Scammon?
A. Yes, sir.
Q. On February 4th, was the mine operated?
A. No, sir.
Q. What happened on February 4th?
A. The men came out and went home. They came to work and went back home again.

Cross-examination of the Witness Morton.

By Mr. Sheppard:

Q. What did you say, Mr. Morton, was the name of the company who owns this mine?

A. Geo. K. Mackie Fuel Company?

Q. What did the men quit for? You say they quit at a certain time, February 4th?

Q. They did not tell me they quit. The mine foreman told me.

Q. You knew what they quit for—the controversy over the Mishmash money, did you not?

A. That is what the foreman told me, yes.

Q. The men quit work on the 4th on account of the Mishmash money not being paid, didn't they?

A. They quit work on the——

Q. On account of the Mishmash money not being paid?

A. I could not tell you. They quit.

Q. The money was paid on the 22nd, was it not?

A. When?

Q. The 22nd?

A. I don't remember whether it was the 22nd, or when it was.

Q. It was paid at the mine, wasn't it, and no court had anything to do with it?

A. It was paid at the company's office.

Q. Where?

A. Scammon.

82 Q. There was no court had anything to do with it, the paying of it, was there? Mr. Morton, you want to be fair, don't you?

A. Yes, sir, I do.

Q. Notice my question. The men quit, as you understood it, because the Mishmash boy who had been a miner there, claimed to have $180.00 due him and it was not paid by the company. Is that what you understood?

A. Yes, that is my understanding.

Q. Immediately upon payment of that, the men went to work, didn't they?

A. Yes, sir.

GEORGE YOUNG, recalled for further cross examination, testified as follows:

Cross-examination.

By Mr. Sheppard:

Q. You have testified fully as to that, except one thing. This Mishmash case was the case of a boy who worked there in the mine, a young man?

A. Yes, sir.

Q. Did he have a family?

A. He was not a married man.

Q. Did he have a family he was supporting?

A. Yes, sir, he did.

Q. On cross examination, I will ask you this. Did that family consist of a widowed mother and 6 other children?

By Mr. Griffith: I object to that as not being cross examination. Objection sustained.

83 & 84 Q. How long had that claim been pending?

A. Pretty near two years, somewhere along there, 18 months, quite a while I know.

Witness excused.

Reporter's Certificate.

STATE OF KANSAS,
Cherokee County, ss:

I, Fred Simkin, hereby certify that I am the Official Court Reporter of the Eleventh Judicial District —, Cherokee County, Kansas, and as such official reporter, I took the testimony given at the trial of the above entitled case. I further certify that the above and foregoing, is a true, full and complete transcript of the testimony given at such trial, together with the objections of counsel, the ruling of the Court thereon, and the exceptions of counsel thereto.

Dated this 20th day of December, 1921. Fred Simpkin, Official Court Reporter.

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86 Be it remembered, That afterwards, and on the 25th day of September, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Counter Abstract, prepared by the appellee herein, which Counter Abstract, is in the words and figures as follows, to-wit:

87 **Index to Counter Abstract.**

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88 In the Supreme Court of the State of Kansas.

[Title omitted.]

Counter Abstract of the Appellee.

The appellant in his abstract has correctly set forth the proceedings of record proper in said cause, but has not sufficiently abstracted the testimony given at the trial of said cause in the district court, and the appellee desires to present to the court a fuller résumé of the evidence at the trial.

GEORGE YOUNG, a witness for the state, testified that he was employed as a miner at mine H of the George K. Mackie Fuel Company, in Cherokee county, Kansas, one and a half miles north and the same distance west of Scammon, and had been in the employ of said company for fifteen years. He was a member of local union No. 498, United Mine Workers of America, and secretary and

treasurer thereof. That said local union had a meeting on the night of February 3, 1921, at Scammon, in Cherokee count, Kansas. (Tr. 324, 325, 326.)

That he was acquainted with Alexander Howat and August Dorchy. That Howat and Dorchy were at the meeting on that evening, and that Howat exhibited the strike order and it was read at the meeting, being exhibit A, appearing at pages 60 and 61, appellant's abstract. It was handed to Young by Howat, who told Young to take it to the mine and read it in the morning. (Tr. 327.) That Howat was president and Dorchy was vice president of district No. 14. (Tr. 329.) Next morning after the meeting witness took the order to the mine at about 6 o'clock a. m., and got there about 6:30 a. m. (Tr. 329.) The mine had been in operation for some days previously. That he read the order to the assembled miners on the morning of February 4, 1921, at which time there were about forty or forty-five miners present. (Tr. 331, 332.) The men all quit after the reading of the order. That he notified the boss, George Jenkins, that there would be no work there that day, and none until the Mishmash claim was paid. (Tr. 332, 333.) That he expected to stop the mine until the claim was paid. (Tr. 351.)

Certain of the men came back to clean up about the 9th of the month; their purpose in cleaning up was to get their portion of the money out of the mined coal. That they did not mine any more coal that day nor until the 23d of February, 1921. (Tr. 334, 335, 336.)

The strike was called for the purpose of collecting the Mishmash claim. (Tr. 339.) Witness stated that he knew the men would quit that morning when he read the order to them, and that the mining operation would stop. (Tr. 340.)

George Jenkins, mine foreman of the George K. Mackie Fuel Company, was called as a witness for the state, and testified that he was foreman at mine H on February 4, 1921, and long prior thereto; that the mine had been in operation up to that time. (Tr. 341.) That forty-five or forty-six men were employed by the company, and that the men assembled at the mine about 6:30 in the morning; that on February 4 he went to the mine about 6:30 and found that the men were leaving, carrying their dinner pails with them. Mr. Young notified him that there would be no more work there until the Mishmash claim was paid. (Tr. 343.)

The mine had been in operation for about three years, with the exception of three or four days before February 3, 1921, and produced about one hundred and forty (140) tons of coal a day and employed forty-five or forty-six men regularly. (Tr. 344, 345.) That the committee of the local union waited on him on the morning of February 4, 1921, and told him that the men had quit, and that the mine would be shut down until the Mishmash claim was paid. (Tr. 345.)

The whistle blew on the 5th and no miners came to work. It was the custom to blow the whistle every morning to call the men to work. On the 9th some of the miners came to clean up the coal that

had been dug before the 4th, for the purpose of getting their portion of the same and have the same loaded out. The miners got their pay in this way for the coal. (Tr. 346, 347.) They did not return to take any more coal until the 23d, after the Mishmash claim was paid. (Tr. 350.) We produced one hundred forty-five (145) to one hundred forty-six (146) tons of coal a day at this mine. (Tr. 348, 349.)

JOHN MCNALLY, a miner, testified for the state that he was a member of the local union and was present on the evening of the 3d of February, 1921, at a meeting of the local at Scammon, Kan., and that Howat and Dorchy were there, and Howat presented the strike order and it was read to the meeting and approved by it on the recommendation of Howat and without dissent from Dorchy. (Tr. 353, 354.) August Dorchy was vice president and Alexander Howat was president of district 14, United Mine Workers of America. (Tr. 354.) That he was present when the order was read at the mine opening on the morning of the 4th of February, 1921, and when all the men were assembled to go to work for the day and had brought their dinner buckets with them, and when the order was read by Mr. Young that all quit and left the mine and took their dinner buckets with them. (Tr. 355.)

The strike order was signed by Mr. Howat and Mr. Dorchy. (Tr. 356.)

Certain of the men came back to clean up on the 9th and did clean up, for the purpose of getting their pay for the coal that had been mined. (Tr. 356, 357.) That the miners quit for the purpose of collecting the Mishmash claim (Tr. 358), and that he knew that when they quit it would stop the mine. (Tr. 360.)

JOHN SAVANT, a miner, a witness for the state, testified that he was present at the mine, a mile and a half north and the same distance west of Scammon, on the morning of February 4, 1921, and that there were forty-six miners assembled ready to go to work that day when Mr. Young read the strike order signed by Howat and Dorchy, and when the said order was read to the men they all quit, and that the purpose of their quitting was to compel the company to pay the Mishmash claim, and they went back to work when the Mishmash claim was paid. (Tr. 362, 363, 364.) Witness was a member of local 398 of the union, which meets at Scammon. (Tr. 362.)

FRANK MOORE testified the same as Mr. Savant. (Tr. 374, 375.) He also stated that the mine was closed down from producing coal February 4, to February 23, 1921. (Tr. 378.)

ANTHONY CRAIN testified as a witness for the state, the same as Mr. Savant. (Tr. 381.)

FRANK HELLMAN, a miner, testified, for the state, that he was a member of the local union and engaged as a miner at mine
91 H of George K. Mackie Fuel Company, and that the strike order was read at the mine on the morning of February 4, 1921, by George Young. That the miners all quit for the purpose of forcing the company to pay the Mishmash claim, and that all went back to work after it was paid, on February 23, 1921. (Tr. 383, 384.)

JACK MORTON, superintendent of the mine, testified, as a witness for the state, that he lived at Scammon, Cherokee county, Kansas; that mine H was running prior to February 4, 1921, and producing coal for railroad and manufacturing purposes. That the mine was located three and one-half miles northwest of Scammon. That about six per cent (6%) of the coal was slack, proper for water and packing plants. That the mine produced from one hundred forty to one hundred forty-six (140 to 146) tons per day, and had forty-six men employed. They were members of the United Mine Workers of America. (Tr. 386.) That it had a full force on February 3, and on February 4, 1921, the men quit because of the strike order signed by Howat and Dorchy. We shipped coal to West Mineral, Hutchinson, Wichita and Kansas City, Kan., for railroads and salt and packing plants. (Tr. 387, 388.) When the men quit on February 4, 1921, it caused a stoppage of production. Could not replace the men readily. (Tr. 389.)

Some came back on the 9th to clean up. They get their pay in that way. (Tr. 390.) They resumed work on the 23d of February, 1921, and we resumed full operation. (Tr. 390.)

The foreman told me that they quit to collect the Mishmash claim. Tr. 392.) The amount, I understand, was $180. (Tr. 395.)

The money was paid to Mishmash by order of the industrial court, and the men came back on the 23d of February, 1921. (Tr. 395.)

D. W. JONES, a witness for the state, testified that he was secretary of the George K. Mackie Fuel Company, with office at Pittsburg, Kan. He kept a correct record of the output of mine H. He produced the record, which was admitted to be correct by defendant's attorneys. (Tr. 400.) The record shows shipments for December, 1920, and January and February, 1921, to the M., K. & T. Railroad Company at West Mineral, Kan., of over 5,000 tons, and to various other firms or companies in Wichita, Hutchinson and Kansas City, Kan., of nearly 1,400 tons. The Kansas City, Kan., consignee was a packing plant and so was the Wichita consignee The Hutchinson consignee was a salt plant. A large amount was also shipped to points outside the state. (Tr. after p. 400.)

92 Howat said to the court in a statement before sentence, which Dorchy said he approved (Tr. 410), that the strike order was made and the strike was called by him and Dorchy to compel the George K. Mackie Fuel Company to pay the Mishmash claim. The defendant introduced no evidence at the trial.

That the above and foregoing is a true and correct counter abstract and statement of the evidence introduced at the trial. Richard J. Hopkins, Attorney General; John G. Egan, Asst. Attorney-General; C. B. Griffith, Asst. Attorney-General; Dennis Madden, Asst. Attorney-General; Leo Armstrong, County Attorney, Cherokee County, Kansas, Attorneys for the Appellee.

93 Be it further remembered, That afterwards on the 5th day of October, 1922, the same being one of the regular judicial days of the January, 1922, Term of the Supreme Court of the State of Kansas, said court being in session in its court room in the city of Topeka, the following proceedings among others *was* had and remains of record in the words and figures as follows, to-wit:

94 In the Supreme Court of the State of Kansas.

Thursday, October 5, 1922.

[Title omitted.]

Journal Entry of Submission.

This cause comes on to be heard on the appeal papers and abstract of the record from the district court of Cherokee county; and thereupon said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

95 Be it further remembered, That afterwards on the 4th day of November, 1922, the same being one of the regular judicial days of the January, 1922, Term of the Supreme Court of the State of Kansas, said court being in session in its court room in the city of Topeka, the following proceedings among others *was* had and remains of record in the words and figures as follows, to-wit:

96 In the Supreme Court of the State of Kansas.

Sat., November 4, 1922.

[Title omitted.]

Journal Entry of Judgment.

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $— and hereof let execution issue.

97 Be it further remembered, That afterwards, on the 4th day of November, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the written opinion of the

court, with the syllabus attached thereto, which opinion and syllabus are in the words and figures as follows to-wit:

98 [Filed Nov. 4, 1922.]

[Title omitted.]

99 **Opinion.**

[Filed Nov. 4, 1922.]

In Supreme Court of Kansas.

The opinion of the court was delivered by PORTER, *J.*:

The appellant, August Dorchy, Vice President of District No. 14, United Mine Workers of America, a labor Union, embracing in its membership persons engaged in coal mining in Crawford and Cherokee Counties, Kansas, was charged (jointly with the President of the same labor union, Alexander Howat), with the violation of the industrial Court Act (Chapter 29, Laws of Kansas, Special Session, 1920,) in calling a strike at Mine H of the George Mackie Fuel Company. He was sentenced to serve six months in the county jail of Cherokee County and to pay a fine of $500.00 and the costs of the prosecution.

He contends that his arrest, trial, conviction and sentence was in violation of the rights guaranteed him under the laws and Constitution of the United States.

The case is controlled by the opinion in State ex rel. v. Howat, 109 Kan. 376, 198 Pac. 959; Court of Industrial Relations v. Packing Co., 109 Kan. 629, — Pac. — and see also State ex rel. v. Howat, 109 Kan. 779, — Pac. —.

On the authority of those cases the judgment is affirmed.

All the justices concurring.

A true copy. Attest: —— ——, Clerk Supreme Court.

100 Be it further remembered, That afterwards, on the 15th day of November, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, Petition for a Rehearing prepared by the appellant herein, which petition for a rehearing is in the words and figures as follows, to-wit:

101 In the Supreme Court of the State of Kansas.

[Title omitted.]

Petition for Rehearing.

[— Nov. 15, 1922.]

It will be remembered that on November 4th, 1922, by an opinion, delivered by Mr. Justice Porter, the appeal of August Dorchy in the above entitled case was decided by this Court and the judgment of the lower Court was affirmed.

The decision being adverse to the said Appellant, August Dorchy, he is filling this, his Petition for Re-hearing in said cause, for the reasons set out herein below.

I.

In deciding the instant case, the Court gave no other or further opinion than a brief statement that the Appellant contended that his arrest, trial, conviction and sentence were in violation of the rights guaranteed to him under the laws and Constitution of the United States, and that the case is controlled by the opinions in State ex rel. vs. Howat, 109 Kansas 376, 198 Pacific 939, Court of Industrial Relations vs. Packing Company, 109 Kansas 629 and State ex rel. vs. Howat, 109 Kansas 779, and that on the authority of those cases, the judgment is affirmed.

We respectfully state that nothing in said cases contained has application to the points urged on behalf of Appellant Dorchy in the instant case, primarily and particularly because the instant case was instituted under the Criminal Sections of the Court of Industrial Relations Act and the other cases, cited by this Honorable Court, were appeals from Judgments for violating an injunction and, in one case, an appeal from an order of the Industrial Relations Court attempting to fix wages.

102 In the instant case, Appellant Dorchy was accused of calling a strike, and his case is one of first impression and we believe that the points under our Federal Constitution, which he has advanced for his protection against the judgment and sentence pronounced against him, should not be brushed aside or rejected without opinion or statement from this Honorable Court.

Nothing in the opinions in the three cases in 109 Kansas, cited by this Court in the instant case, cover- or even refers to the right of an officer of a labor organization to call a strike or the rights, privileges and immunities, as set up by this Appellant in this case, as claimed to be guaranteed to him under the Constitution of the United States.

The decision of this Honorable Court in the instant case holds that the Kansas Court of Industrial Relations Law, being Chapter 29, Kansas Special Session Laws, 1920, is not repugnant to the Constitu-

tion and laws of the United States, as specifically set out by the Appellant in appropriate pleadings in the trial court and in his Specifications of Error and Brief in this honorable court, and the decision in this Honorable Court is in favor of the validity of said Statute, but the decision wholly omits to state or explain the reasoning or authority under which said decision is reached. The opinion leaves investigators into the law of the subject wholly uncertain as to the application of the penal sections of said Kansas Court of Industrial Relations Law, and their alleged repugnance to the Constitution and laws of the United States.

II.

Appellant Dorchy specifically claimed rights and immunities under the Constitution of the United States, including the right of free speech, the right to due process of the law, the right of liberty of contract, and other rights, privileges and immunities under the Constitution of the United States *and* set out.

We respectfully submit that in conformity with the Constitution and laws of the State of Kansas and the practice of this Honorable Court, a rehearing should be granted so that this Court may
103 give further consideration to the points and argument in behalf of these Federal Constitutional rights of this Appellant to the end that any mistake of judgment which this Court may have made may be corrected and justice done to this Appellant, and to the further end that this Appellant and all others who may be or become similarly situated, or who may be interested in knowing the extent and application of the decision in this case to these points, may be fully advised as to the meaning and effect of the decision in this case.

III.

It was urged on behalf of this Appellant, in addition to the points referred to above, that the Kansas Court of Industrial Relations Act was a void attempt on the part of the Legislature of the State of Kansas to affect the business of coal mining with a public interest and therefore an attempt to exercise, under the guise of police power, an authority violative of the Federal Constitution.

We respectfully suggest that this case should be re-heard in this Honorable Court so that further consideration be given to distinctions between the industry affected with a public use and an industry in which there is merely a public interest and so that the recent decisions of the United States Supreme Court on said point be stressed by this Appellant and particularly the recent decision of the United States Supreme Court in the Coronado Coal Company Case.
104 None of the cases cited in the opinion in the instant case deals with these points and we respectfully urge a re-hearing so that we may more definitely know the decision and judgment of this Court upon these Federal Constitutional points.

IV.

The Appellant urged in appropriate pleadings and before this Honorable Court in his Brief that the Kansas Court of Industrial Relations Law is void as an arbitrary, oppressive, unreasonable and unjust discrimination and violation of the 14th Amendment to the United States Constitution. Appellant specifically stated that the Act omitted from its provisions agricultural products and live stock while in the hands of producer or raiser, and thereby made criminal upon the part of individuals, situated as was this Appellant, acts which others, within the State, were free to do and perform without limitation or restriction. Appellant respectfully suggests that the decision of the United States Supreme Court in Connelly vs. Union Sewer Pipe Company, 184 U. S. 540, 22 Supreme Court 43, 46 Lawyers' Edition 679, is controlling on this point, and that a further consideration would induce this Court to hold that the Act in question is repugnant to the 14th Amendment. We believe that nothing contained in the cases in 109 Kansas, cited by this Court in the judgment in the instant case, considers or disposes of this important Federal Constitutional point.

V.

Appellant has urged the objection that the Kansas Court of Industrial Relations Law is void as against the 14th Amendment to the Federal Constitution because it is a penal statute that is too vague, indefinite and uncertain and an unlawful restraint upon Inter-state Commerce, and we respectfully submit that the judgment in
105 the instant case does not refer to, consider or satisfactorily dispose of this important objection. Nothing in the decision in the instant case, or in the cases in 109 Kansas, relied upon for authority in disposing of the instant case, can have any bearing upon the force, reasoning and legal effect of the decision of the United States Supreme Court in Oklahoma Operating Company vs. Love, 252 U. S. 331, or the cases therein cited, and the cases submitted to this Court in support of Appellant's contentions.

VI.

Appellant respectfully submits that he has urged before this Court the point that the Kansas Court of Industrial Relations Act is void as an abridgement of his privileges and immunities as a citizen of the United States, as guaranteed to him under the Federal Constitution and particularly as affecting his right to strike, picket, and do other things in connection with the conduct of a Labor Union, as an officer of said Union to counsel others to do, and that Section 18 and Section 19 of said Act, as applied to this Appellant in the instant case, subjects him to punishment for acts, publications or utterances which may be freely made on the privilege of freedom of speech under the 14th Amendment to the Federal Constitution and under the provisions of the Statutes of the United States, known as the Clayton Act.

We respectfully request the Court to grant a re-hearing to the end that this, and other similar rights and arguments of this Appellant, be further considered and submit that the opinion in this case contravenes, on Federal Constitutional and statutory points, the holdings in the following cases:

American Steel Foundries vs. Tri-City Trades Council No. 2, decided by the United States Supreme Court on December 5th, 1921;
Coppage vs. Kansas, 236 U. S. Page 1;
Adair vs. United States, 208 U. S. 161;
Adams vs. Tanner, 244 U. S. 590;
Hitchcock Coal & Coke Co. vs. Mitchell, 245 U. S. 229, 251;
Alguier vs. Louisiana, 165 U. S. 578;
Truax vs. Raich, 239 U. S. 33;
Butchers Union etc. vs. Crescent City L. S. L. & S. H. Co. 111 U. S. 746;
Powell vs. Pennsylvania, 127 U. S. 678;
Colyer vs. Skeffington, 265 Fed. 62.

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VII.

Appellant has urged that Chapter 29 of the Kansas Special Session Laws of 1920, named the Court of Industrial Relations Law, as applied to him in the instant case, is a denial of his liberty of contract as guaranteed under the 14th amendment and has urged that Sections 8, 9, 15, 17, 18, 19 and 23, as applied to him violate his rights under the 14th Amendment to the Constitution as restricting or destroying his "liberty to contract," his "property rights," his "due process" and his "equal protection." Appellant urged that nothing in the decision in the instant case or in the cases relied upon for authority in disposing of the instant case has any reference or force in the application of the criminal sections of Chapter 29 and that a rehearing should be granted to the end that the decision of this Court may be more clearly set out upon these points.

VIII.

Your petitioner further avers that he has urged in the Court below and in this Honorable Court, and does now urge that the Court of Industrial Relations Act violates Section 2 of Article 4 of the Constitution of the United States in the particulars heretofore set out, and that nothing in the decision in the instant case, or the cases in 109 Kansas, relied upon for disposing of the instant case, refers to or tends to settle the state of the law in Kansas on this important subject and that a re-hearing should be granted to the end that this Court may further consider said point as urged by this Appellant.

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X.

We believe that due process of law, as guaranteed under the Federal Constitution, protects this Appellant from being subjected to any

criminal statute, such as the Court of Industrial Relations Act, which commingles the three great departments of Government. In State vs. Johnson, 61 Kansas, 803, this Court adopted what is believed to be the opposite view to the position now held by this Court as indicated by its decisions in the Court of Industrial Relations cases, but this Court has not in any decision declaratively over-ruled the State vs. Johnson decision, or distinguished between same and the Court of Industrial Relations cases.

XI.

In State vs. Haun, 61 Kansas 146, this Court declared the "script law" unconstitutional. The Court of Industrial Relations Law clearly is subject to the same objections that induced this Court to rule out the "script law" but this Court does not, in any of the Court of Industrial Relations Law Cases, expressly alter or distinguish its position and leaves this subject matter be-clouded and confused.

108 XII.

In Coffeyville Vitrified Brick & Tile Company vs. Perry, 69 Kansas 297, this Court held an Act of the State of Kansas, which is subject to some of the objections urged herein, and which affected the right to make contracts for employment, et cetera, as a violation of the rights guaranteed by the provisions of the National Constitution. In that case, this Honorable Court held that "every person is protected in his right to work where and for whom he will." He may select not only his employer but also his associates. Any act of the Legislature that would undertake to impose upon an employer the obligation of keeping in his service one whom for any reason he should not desire, would be a denial of his constitutional rights to make and terminate contracts and to acquire and hold property. * * * The position conducted by the defendant was his property and in the exercise of his ownership it is protected by the Constitution. He could abandon or discontinue its operation at pleasure. It had the right beyond the possibility of Legislative interference, to make any contract in reference thereto not in violation of law. In the operation of its property it may employ such persons as are desirable and discharge without reason those who are undesirable. Those are liberties of persons to contract for their services in any manner that is satisfactory to both. No legislative restriction can be imposed upon the lawful exercise of these rights.

"Within the past two decades there has been an epidemic of this class of legislation: New York, New Jersey, Ohio, Iowa, Indiana, Illinois, Missouri, Wisconsin, Colorado and California have similar statutory provisions, and in such states where the constitutionality of these statutes *have* been before the Courts, the law has been universally held to be a denial of the rights guaranteed by the provisions of the National and State Constitutions."

Surely this Honorable Court does not intend that such reasoning and decisions of this Court shall apply to, and enure to the benefit of, only the employers of labor, and be denied to any employee, or the official of a Labor Organization, in which position this Appellant stands. Nothing in the decisions of this Court tends to overrule or re-affirm either declaratively or by plain intendment.

XIII.

The Court, in deciding that the Clayton Act, (38 U. S. Statutes at large, 730) and the Lever Act (40 Statutes at large, 278) did not affect the present controversy, has misconstrued these acts of Congress.

It is elementary that where the Federal Government has exercised control in cases within its jurisdiction that the state, while at liberty to legislate prior to the assumption of control by the Federal Government, is thereafter precluded. A comparison between the Lever Act and the Clayton Act, and the Court of Industrial Relations Act, will demonstrate that these subjects are considered.

Section 20 of the Clayton Act provides, "And no such restraining order or injunction shall prohibit any person or persons, whether single or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceable assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. (38 Stat. L. 738)"

The Lever Act provides in part as follows: "Sec. 9. (Conspiracy to restrict supply of necessaries, etc.) That any person who conspires, combines, agrees, or arranges with any other person to conspire with other person to quit their employment or to induce other persons to quit their employment for the purpose of hindering, delaying, interfering with, or suspending the operation of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act, or for any person to engage, in what is known as "picketing," or to intimidate by threats, abuse, or in any other manner any person or persons with intent to induce such person or persons to quit such employment, or for the purpose of deterring or preventing any other person or persons from accepting employment or from remaining in the employ of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act."

The Court of Industrial Relations Act provides, "it shall be unlawful for any such individual employee or other

son (*a*) to limit the facilities for transporting, producing, manufacturing, supplying, storing, or dealing in any necessaries; (*b*) to restrict
110 the supply of any necessaries; (*c*) to restrict the distribution of any necessaries; (*d*) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof shall, upon conviction thereof be fined not exceeding $10,000 or be imprisoned for not more than two years, or both. (— Stat. L. —.)"

The comparison above will, I think, be amply sufficient to show this Court that the Kansas Legislation respecting the subject of strikes and picketing has come within the power of the Federal Government and that such exercise of that power as Congress has thought proper has been put forth in the sections above set out.

XIV.

The Appellant again urges that the Court of Industrial Relations Law and the judgment in the instant cases contravene the Interstate Commerce Clause of the United States Constitution and constitute an unwarranted, arbitrary, and oppressive and unreasonable restraint upon Interstate Commerce and with the operation of Federal Statutes, particularly the Adamson Law.

Appellant respectfully urges that a re-hearing be granted so that this may be set before the Court more clearly than heretofore and so that the final opinion and judgment of this Honorable Court may make plain the state of the law on this important subject.

XV.

Appellant again respectfully directs the attention of this Honorable Court to Section 1 of Article 13 of the United States Constitution and re-affirms and states that his conviction and sentence under the Kansas Court of Industrial Relations Law and a denial to him and others similarly situated of the right to strike constitutes subjection to involuntary servitude in violation of the Constitution of the United States.

Appellant states that the operation of the Kansas Court of Industrial Relations Law as applied in this case denies the right of Appellant and other officers of Labor Organizations to direct the cessation of work in any coal mine or other similar industry in the State of Kansas under any conditions whatever and leaves the workers sub-
111 ject to punishment as for a crime if they "strike, or collectively cease work."

XVI.

Appellant respectively submits that the Kansas Court of Industrial Relations Act is void, as a violation of due process of law as guaranteed under the 14th Amendment and of the Involuntary Servitude

Clause of the 13th Amendment, in that it empowers said Court to fix wages, hours of work, conditions, taking over and operating industries, and, generally, to install a system of State Socialism.

XVII.

The Kansas Court of Industrial Relations Act, as applied to Applicant, is void as a denial of the liberty of contract as guaranteed under the 14th Amendment to the Constitution of the United States, particulary, as Section 4 of said Act gives the Court of Industrial Relations "full power, authority and jurisdiction to supervise, direct and control the operation" of coal mining and similar industries and Section 8 and Section 9 of said Act gives said Court of Industrial Relations the power to fix wages in said industries and rates so fixed to be binding without review for at least sixty (60 days.

Wherefore, to the end that a further consideration may be given your previous decisions which have heretofore been overlooked, inadvertently, by this Court, and by counsel, and to the end that the governing and controlling law on this important subject be clearly defined and set out, this Appellant prays that this petition for a re-hearing may be granted and that said cause shall be set down for a hearing under such terms as this Court shall direct, and for such other and further relief as to this Court may seem just. Redmond S. Brennan, Kansas City, Missouri, Phil H. Callery, Pittsburg, Kansas, Attorneys for Appellant. Phil H. Callery, J. E. Callery, Pittsburg, Kans.

112 [File endorsement omitted.]

113 Be it further remembered, that afterwards and on the 15th day of November, 1922, the same being one of the regular judicial days of the July, 1922, term of the Supreme Court of the State of Kansas, said court being in session in its court room in the City of Topeka, the following proceedings among others *was* had, and remains of record in the words and figures as follows, to-wit:

114 In the Supreme Court of the State of Kansas.

Wednesday, November 15, 1922.

[Title omitted.]

Journal Entry Denying Rehearing.

Now comes on for decision the petition for a rehearing of this cause, and thereupon it is ordered that said petition for a rehearing be denied.

115 In the Supreme Court of the State of Kansas.

[Title omitted.]

Clerk's Certificate.

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a true, full and complete transcript of the record and proceedings had in the above entitled case, and also of the opinion of the court rendered thereon as the same appear on file and remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, Kansas, this 24th day of November A. D. 1922. D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. [Seal of the Supreme Court, State of Kansas.]

116 Here follow:

The Original Petition for a Writ of error.
The Order allowing the Writ of Error and fixing the bond for appeal at Two Thousand Dollars.
The Assignments of Errors.
A copy of the Bond for appeal.
The Original Writ of Error.
The Original Citation together with acknowledgment of service thereof.

117 In the Supreme Court of the United States.

[Title omitted.]

Petition for Writ of Error.

[Filed Nov. 15, 1922.]

Now comes August Dorchy and reports that on the — day of November, 1921, a final judgment was duly entered by the Supreme Court of the State of Kansas affirming the judgment and sentence entered by the District Court of Cherokee County Kansas, in a proceeding wherein the State of Kansas was plaintiff and August Dorchy, defendant, which judgment and sentence was in favor of the plaintiff and against the defendant.

That this action was a criminal proceeding instituted against the defendant upon a charge that he violated certain provisions of Chapter 29 of the Kansas Special Session Laws, 1920, known as the Kansas Court of Industrial Relations Act, in that as an officer of a Labor Organization of mine workers, he participated in the calling or ordering of a strike at Mine "H" of the Mackie Fuel Company in Cherokee County, Kansas.

That plaintiff in error herein is, and at the times referred to in said cause was, an officer of the United Mine Workers of America, an association commonly known as a Labor Union. In his answer in said cause in the District Court of Cherokee County, State of Kansas, the plaintiff in error averred that the proceeding was a violation of his constitutional rights as guaranteed by the Constitution of the United States, and averred that the Act creating the Court of Industrial Relations, which is the Act above referred to, and the proceeding being resorted to in this cause, violated the constitutional rights and privileges guaranteed to plaintiff in error in and by the 14th Amendment to the Constitution of the United States as well as the 5th Amendment of the Constitution of the United States, as well as the 13th
118 Amendment to the Constitution of the United States, and also deprived this plaintiff in error of his liberty and property without due process of law, and abridged his privileges and immunities as a citizen of the United States, all contrary to the Constitution of the United States of America.

And your petitioner avers that in his answer and defense made to the accusation, he expressly charged that the Act creating the Court of Industrial Relations was in violation of the Constitution of the United States, and therefore unconstitutional and void, for the reason that in the powers sought to be conferred upon said Court by said legislative enactment, legislative, judicial and administrative functions are commingled and interwoven in a manner violating the Constitutional requirements that the three great departments of the government, and the powers and duties of each, be independently exercised and separately maintained.

Your petitioner further avers that said Kansas Court of Industrial Relations Act is unconstitutional and void for the reason that said legislative enactment violates Section 21 of Article 4 of the Constitution of the United States.

Your petitioner further avers that said Act is violative of Section 1 of Article 13 of the Constitution of the United States and that said contention is expressly made by this defendant in his defense to said accusation. That in said suit your petitioner claimed the rights, privileges and immunities hereinabove set forth. That notwithstanding these facts, the Supreme Court of the State of Kansas decided against the rights, privileges and immunities thus specified, set forth and claimed by this petitioner.

And your petitioner shows that the judgment and decision and interpretation of the Constitution of the United States and of the Federal Statutes enacted under the provisions of said Constitution, and the denial to him of his right of freedom of speech, personal liberty and freedom of contract, and other rights, hereinabove stated, as herein claimed, were and are repugnant to and contravene the Constitution and statutes of the United States of America.

Your petitioner further shows that the Supreme Court
119 & 120 of the State of Kansas is the highest court in said State to which this cause may or might be taken, and your petitioner further avers that in the aforesaid judgment and proceeding certain errors were committed to the prejudice of your petitioner, all

of which will more fully appear from the assignment of errors which is filed herein.

Wherefore, your petitioner prays that his Writ of Error from the Supreme Court of the United States may issue in this cause to the Supreme Court of the State of Kansas, for the correction of errors so complained of, and that a transcript of the record and proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Kansas may be sent to the Supreme Court of the United States as provided by law. Redmond S. Brennan, Kansas City, Missouri; Frank B. Heggarty, Kansas City, Mo., Attorneys for Petitioner and Plaintiff in Error. Phil H. Callery, J. E. Callery, Pittsburg, Kansas.

121 [File endorsement omitted.]

122 In the Supreme Court of the United States.

[Title omitted.]

Order Allowing Writ of Error.

[Filed Nov. 15, 1922.]

On the consideration of the petition of August Dorchy, Plaintiff in Error, for a Writ of Error, and Assignments of Error, and upon due consideration of the record of said cause:

It is ordered that a Writ of Error be allowed from the Supreme Court of the United States as prayed for in said petition and that said Writ of Error and Citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said Petitioner and Plaintiff in Error, August Dorchy, give security in the sum of Two Thousand Dollars; that said Plaintiff in Error shall prosecute said Writ of Error to effect and if said Plaintiff in Error fails to make good his plea, shall answer to the Defendant in Error for all costs and damages that may be adjudged or decreed on account of said Writ of Error.

And the said Plaintiff in Error now presenting a bond in the sum of Two Thousand Dollars with W. J. Watson and H. B. Kumm, as sureties, it is ordered that the same be and is hereby duly approved.

In witness whereof I have hereunto set my hand this 15th day of November, 1922. W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

123 [File endorsement omitted.]

124 In the Supreme Court of the United States.

[Title omitted.]

Assignment of Errors.

[Filed Nov. 15, 1922.]

Now comes August Dorchy, Petitioner and Plaintiff in Error, by Redmond S. Brennan and Phil H. Callery, his attorneys, and in connection with his Petition for Writ of Error, shows that in the record and proceeding and the rendering of the judgment and decision of the Supreme Court of the State of Kansas in the above entitled cause, manifest error has intervened to the prejudice of this Petitioner and Plaintiff in Error, in this to-wit:

I.

That the Supreme Court of the State of Kansas erred in affirming the decree, judgment and sentence of the District Court of Cherokee County, Kansas, and directing that the judgment and sentence of said District Court be carried into force and effect because said decision of the Supreme Court of the State of Kansas, as aforesaid, denied this Plaintiff in Error of his rights of personal liberty and freedom of contract, as guaranteed by the 14th Amendment to the Constitution of the United States, in that by said decision of the Honorable Supreme Court of the State of Kansas it was held that numerous invalid sections of said Industrial Court Act did not destroy or render invalid the whole Act, which decision is in conflict with the previous decisions of the State of Kansas and the Supreme Court of the United States.

Therefore, the Supreme Court of the State of Kansas erred in holding that the decision of the District Court of Cherokee County, Kansas, did not violate the 14th Amendment to the Constitution of the United States.

125 II.

The Supreme Court of the State of Kansas in its decision *is* in the above-entitled cause erred in holding that the violation of said Industrial Court act of the Constitution of the United States and the Federal statutes did not invalidate the whole of said law and erred by such decision and refusal to pass upon the validity or invalidity of the whole act.

III.

The decision of the Supreme Court of the State of Kansas, is erroneous, in that said decision is in conflict with and violates the provisions of the Act of Congress of October 15, 114, 38 U. S. Statutes 738 (the Clayton Act), which act makes peaceful picketing lawful.

Whereas, by the aforesaid decision of the Supreme Court of the State of Kansas the provisions of the Industrial Court act denying the right to peacefully picket is upheld.

IV.

The decision of the Supreme Court of the State of Kansas in the aforesaid cause is erroneous for the reason that the power vested in the Industrial Court by the said Industrial Court act is an encroachment upon the power vested in the United States Government to regulate and control the production and distribution of food and fuel under the Lever Act, is by said decision upheld and maintained.

V.

The decision of the Supreme Court of the State of Kansas is erroneous in that said decision is at variance with the decision of the highest courts of the states, and the federal appellate courts, as to the right of the legislature to interfere with personal liberty, regulation of wages and freedom of contract, the right to strike, and the right to peacefully picket, under their constitutions and the Constitution of the United States, which questions are of such general importance throughout the land as to merit review and determination by the Supreme Court of the United States.

VI.

The decision of the Supreme Court of the State of Kansas is
126 erroneous for the reason that ir violates Section 1 of Article 13 of the Constitution of the United States known as the 13th Amendment.

VII.

The decision of the Supreme Court of the State of Kansas is erroneous for the reason that said decision is in conflict with and violates Section One of Article 15 of the Amendments to the Constitution of the United States, known as the 15th Amendment and thereby violates the rights guaranteed to these plaintiffs in error by said Constitutional provisions.

VIII.

The decision of the Supreme Court of the State of Kansas is erroneous in that it decides that the commingling of the ligislative, executive and judicial powers of government in one body, does not thereby render the act creating said body unlawful, illegal and unconstitutional, which decision is grossly prejudicial to the rights of this plaintiff in error, which rights are guaranteed under the Constitution of the United States and the form of government established thereby.

IX.

The decision of the Supreme Court of the State of Kansas is erro-
ous and an encroachment on the constitutional rights of this peti-
ner because such decision upholds an order of a court of the State
Kansas commanding this petitioner to obey the statute of said
te, which statute is unconstitutional and void, and said order was
refore a violation of a constitutional right of plaintiff in error.

X.

The Supreme Court of the State of Kansas erred in deciding that
e constitutional rights of this petitioner under the Constitution of
United States were not brought into question in the instant case.

XI.

The Supreme Court of the State of Kansas erred in not upholding
e contention of this petitioner to the effect that the Kansas Court of
dustrial Relations Act constitutes class legislation, unjust and illegal
crimination and arbitrary and unreasonable classification in viola-
n of the 'due process' clause of the 14th Amendment to the United
ates Constitution.

7 & 128 XII.

That the Supreme Court of the State of Kansas erred in deciding
at the Legislature of the State of Kansas may make it a crime to
ike, to picket, or, as an officer of a Labor Organization, to compel
direct others to strike or to peacefully picket, and that the convic-
n and sentence of this petitioner in this cause was not a violation
his right of free speech as guaranteed to him under the Constitu-
n of the United States of America. Redmond S. Brennan, Kansas
y, Missouri; Frank B. Heggarty, Kansas City, Mo., Attorneys for
laintiff in Error. Phil H. Callery, J. E. Callery, Pittsburg, Kansas.

29 [File endorsement omitted.]

30 In the Supreme Court of the State of Kansas.

[Title omitted.]

Bond on Writ of Error.

[Filed Nov. 20, 1922.]

Know all men by these presents, that the undersigned August Dor-
hy, and W. J. Watson, and H. B. Kumm as sureties, residents of
rawford County, Kansas, hereby acknowledge ourselves firmly
ound and indebted to the State of Kansas in the penal sum of Two

$2,000.00 Thousand Dollars, for the payment of which we bind ourselves, our heirs, executors and administrators.

The conditions of this undertaking and obligation are such that, whereas, the said above named August Dorchy has been convicted in the District Court of Cherokee County, Kansas, of a misdemeanor, as charged in the accusation filed in said case, and has been sentenced by said Court upon said conviction, and, whereas, the said above named August Dorchy appealed from the decision, judgment and sentence rendered against him in said cause to the Supreme Court of the State of Kansas, and whereas, the Supreme Court of the state of Kansas affirmed the decision of the said District Court of Cherokee County, Kansas, and whereas, said August Dorchy desires to appeal from the decision of the Supreme Court of Kansas to the Supreme Court of the United States.

Now, therefore, if the said above August Dorchy shall well and truly appeal said case and diligently according to law prosecute said appeal to a final termination in the Supreme Court of the United States, and abide the orders, decision and judgment of the Court, then and in that event this bond shall be null and void, otherwise
131 to remain in full force and effect.

Witness our hands this 18th day of November, 1922. August Dorchy, Principal. W. J. Watson, Surety. H. B. Kumm, Surety.

Qualification.

STATE OF KANSAS,
Crawford County, ss:

We, the undersigned, do solemnly swear that we are each residents of Crawford County, Kansas, and that we are each worth Two Thousand ($2,000.00) Dollars over and above all debts, exemptions and liabilities, so help us God. W. J. Watson, Surety. H. B. Kumm, Surety.

Subscribed and sworn to before me this 18th day of November, 1922. Laura A. Wilson, Notary Public. [Seal.] My commission expires January 18, 1923.

Nov. 20th, 1922.

Approved— W. A. Johnston, Chief Justice.

[File endorsement omitted.]

In the Supreme Court of the United States.

[Title omitted.]

Writ of Error.

[Filed Nov. 15, 1922.]

THE UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Justices of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in said Supreme Court of the State of Kansas before you, or some of you, being the highest Court of law or equity of the said state in which a decision could be had in said suit between August Dorchy, Appellant, vs. The State of Kansas, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and a decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said August Dorchy, Appellant, as by said complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, *do* send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you may have the same in said Supreme Court in Washington, within thirty (30) days from the time hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, the 15th day of November, in the year of our Lord One Thousand Nine Hundred and Twenty-two. [L. Campbell, Clerk United States District Court for the District of Kansas. [Seal of the District Court U. S., District of Kansas.]

Allowed this 15th day of Nov. 1922. W. A. Johnston, Chief Justice.

134 [File endorsement omitted.]

135 In the Supreme Court of the United States of America.

[Title omitted.]

Citation and Service.

[Filed Nov. 15, 1922.]

United States of America to Richard J. Hopkins, Attorney General of the State of Kansas, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Kansas, wherein August Dorchy the Appellant, is Plaintiff in Error, and The State of Kansas, Appellee, is Defendant in Error, to show cause, if any there by, why the judgment rendered against the said Plaintiff in Error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, this 15th day of November, in the Year of Our Lord One Thousand Nine Hundred and Twenty-two. William A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

Acknowledgment of Service.

I hereby acknowledge service of above and foregoing Citation this 15 day of November, 1922. Richard J. Hopkins, Attorney General of the State of Kansas. By John G. Egan, Asst. Atty. Genl.

136 [File endorsement omitted.]

137 **Certificate of Lodgment.**

State of Kansas,
Supreme Court, ss:

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that there was lodged with me as such clerk, on November — 1922, in the above entitled cause,—

1 The Original Bond for appeal a copy of which is herein set forth

2 Two copies of the Writ of Error as herein set forth, one for the Appellee and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court of the State of Kansas, in the city of Topeka, this 24th day of November, A. D. 1922. D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. [Seal of the Supreme Court, State of Kansas.]

138 **Return to Writ of Error.**

UNITED STATES OF AMERICA,
State of Kansas, ss:

In obedience to the commands of this writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Kansas in the City of Topeka, this 24th day of November, A. D. 1922. D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. [Seal of the Supreme Court, State of Kansas.]

Endorsed on cover: File No. 29,279. Kansas Supreme Court. Term No. 729. August Dorchy, plaintiff in error, vs. The State of Kansas. Filed December 12th, 1922. File No. 29,279.

In the Supreme Court of the United States

OCTOBER TERM, 1922. No. 163.

(Was No. 736, October Term, 1922.)

AUGUST DORCHY, Plaintiff in Error,

vs.

THE STATE OF KANSAS, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

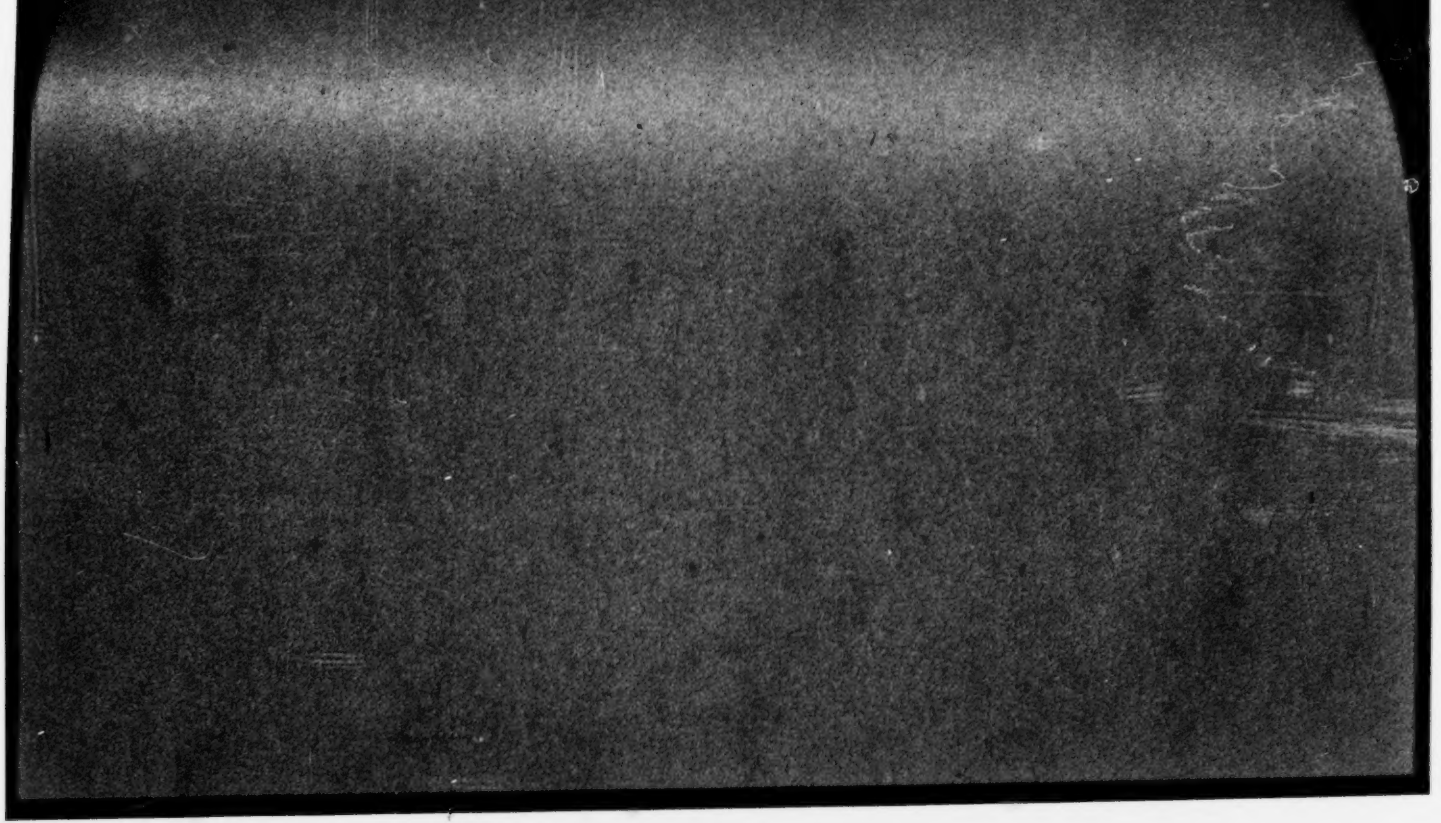
BRIEF OF PLAINTIFF IN ERROR.

REDMOND S. BRENNAN,
Kansas City, Mo.,
Attorney for Plaintiff in Error.

JOHN F. McCARRON,
Washington, D. C.,
FRANK BONAR HEGARTY,
Kansas City, Mo.,
PHIL H. CALLERY,
Pittsburg, Kansas,
Of Counsel.

(29,279)

HUDSON-KIMBERLY PUB. CO., KANSAS CITY, MO.



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In the Supreme Court of the United States

OCTOBER TERM, 1923, No. 163.

(Was No. 729, October Term, 1922.)

AUGUST DORCHY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

The cause herein comes to this court on writ of error to the Supreme Court of the State of Kansas.

In January of 1920, the legislature of the State of Kansas enacted what is known as the Court of Industrial Relations Act; Chapter 29, Kansas Special Session Laws of 1920. (The Act has since been amended [Kansas Session Laws of 1921], by creating a Public Utilities Commission and trans-

ferring thereto the administration of the Act as to regulation of public utilities.)

Under date of February 17, 1921, complaint was made by the then Attorney General of Kansas, and the then County Attorney of Cherokee County, before J. R. Carter, Justice of the Peace of Cherokee County, Kansas, charging among other things that Alexander Howat and August Dorchy as officers of District No. 14 of the United Mine Workers of America unlawfully, willfully, intentionally and feloniously used their respective power, authority and influence to impel and influence certain members of said Labor Union to quit their said employment as mine workers at Coal Mine "H" of the George K. Mackie Fuel Company in Cherokee County, Kansas, for the purpose of hindering, delaying, interfering with and suspending the operation of said coal mine "H" in the production and mining of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in the State of Kansas as contrary to the form of the Statutes in such case and against the peace and dignity of the State of Kansas.

Warrants were issued for Alexander Howat and August Dorchy and they were arrested. Both defendants plead not guilty and were released on bond for appearance before the District Court of Cherokee County. Motion to quash complaint and plea in abatement and motion to quash warrant and pretended service were made by defendants, and overruled by said court.

An information was filed by the then Attorney General of Kansas and the then County Attorney of Cherokee County in the District Court of Cherokee County against Alexander Howat and August Dorchy containing two counts in which they are charged with the same offense as set forth in the complaint filed in the Justice of the Peace Court and that said alleged offense was to evade the provisions of Chapter 29, Special Session Laws of Kansas, 1920, which is the Court of Industrial Relations Act.

The first count charges a felony, in that the defendants, in their capacities as officers of a labor organization, ordered and impelled the certain miners to cease work.

The second count charges a misdemeanor, in that the defendants, in a private or individual capacity, impelled the miners to cease work.

Motion to quash information was made by defendants on the ground that their Federal rights have been violated and the particular sections of the Constitution of the United States were set forth. Said motion was overruled by the court.

The case came on for hearing before the District Court and the evidence introduced by defendant in error shows that an order was made by the Executive Board of Miners of District No. 14 and issued by Alexander Howat, President, and August Dorchy, Vice-President of District No. 14 to the men employed at the mine of the Mackie Fuel Company, "to cease work beginning Friday morning, February 4, 1921, until such time as the company pays Brother Carl Mishmash the amount

of money due him in accordance with the settlement made by the Joint Board of Miners and Operators in this case. This case has been settled by the Joint Board of Miners and Operators but the company refuses to comply with the settlement that had been made and refuses to pay Brother Mishmash any part of the money that is due .

It is further shown by the evidence that the men to the number of 45 or 46, employed at the Mackie Mine ceased work, and immediately returned to work after the Mackie Company had paid the money to Mishmash due him from it. This mine was idle about three weeks.

The District Court, in its instructions to the jury, stated that the defendants were charged with a violation of Sections 3, 17, 18 and 19 of the Court of Industrial Relations Act. The jury found the defendants guilty of a misdemeanor in violation of Chapter 29 of the laws of Kansas of the Special Session 1920 committed in the manner and form charged in the information.

Motion for new trial was made and overruled and on July 27, 1921, Alexander Howat and August Dorchy, the defendants, were sentenced to six months confinement in the county jail of Cherokee County and each to pay a fine of $500 and costs.

Appeal from the sentence and judgment of the District Court of Cherokee County was taken to the Supreme Court of Kansas where plaintiffs in error again pressed with earnestness their Federal

Constitutional rights both by oral argument and brief.

The Supreme Court of Kansas, in a very short opinion, affirmed the judgment of the District Court of Cherokee County and sustained the validity of the Court of Industrial Relations Act.

The case against Alexander Howat has been separately disposed of.

Petition for rehearing was filed and denied by the Supreme Court of Kansas.

Petition for writ of error on behalf of August Dorchy was filed and assignments of error again stressing Federal Constitutional rights of plaintiff in error were made and the Chief Justice of the Kansas Supreme Court signed an order allowing a writ of error to this Honorable Court.

SPECIFICATION OF ERRORS.

The plaintiff in error claims that the Supreme Court of the State of Kansas erred in affirming the judgment of the District Court of Cherokee County, Kansas, in refusing to declare that Chapter 29, Kansas Special Session Laws, 1920, is void for the following reasons:

First: That the judgment of the District Court of Cherokee County, Kansas, ordering and adjudging that the plaintiff in error be confined in the county jail of Cherokee County, Kansas, for a period of six months and pay a fine unto the said State of Kansas in the sum of $500 and costs is void as said judgment is a denial of due process as guaranteed to plaintiff in error by the Fourteenth Amendment to the Constitution of the United States.

Second. The District Court of Cherokee County, Kansas, was without authority to adjudge plaintiff in error guilty of a violation of Section 3 of the Court of Industrial Relations Act for the reason that the mining of coal is not clothed with a public interest and therefore that section of the said Act is void and of no effect.

Third. That as the mining of coal is not affected with a public interest there was no violation of Section 17 of the Court of Industrial Relations Act by the order of the Executive Board of District No. 14 signed by plaintiff in error and sent to certain members of said District No. 14 notifying

them to cease work until such time as the Mackie Fuel Company pay Carl Mishmash, one of its members, the money due him in accordance with settlement made by the Joint Board of Miners and Operators.

Fourth. Because the District Court of Cherokee County, Kansas, was without jurisdiction to make its judgment against plaintiff in error committing him to jail and imposing fine and costs upon him under Section 18 of the Court of Industrial Relations Act, as the plaintiff in error was not guilty of a misdemeanor or any other crime.

Fifth. Because the legislature of the State of Kansas may not make it a crime for an officer of a labor organization to call a strike in a coal mine, as the business of coal mining is not clothed with a public interest and such an act therefore violates the due process clause of the Fourteenth Amendment.

ARGUMENT.

POINT I.

The business of coal mining is not clothed with a public interest, and therefore Section 3 of the Kansas Court of Industrial Relations Act violates liberty of contract and due process of law under the Fourteenth Amendment.

Under subdivision (3) of Section 3 of the Act in question it is provided, in part: "The mining or production of any substance or material in common use as fuel, either for domestic, manufacturing or transportation purposes," is "declared to be affected with a public interest and therefore subject to supervision by the state."

The Legislature by said enactment seeks to derive its authority from the police power of the state in that it sets forth in said enactment that said power is to protect the public health, and morals, and promote the general welfare, and suggests inferentially that the authority therein derived to regulate certain industries, enterprises, etc., affected with a public use and public interest, is part and parcel of the police power.

Like all grants of power in this republican form of government under which we live, there is a limitation upon the same, and so it is with the police power of the state. The power to regulate business affected with a public use as distinguished from a public interest only, is a valid exercise of

the police power, but the authority to affect with a public interest the business of coal mining cannot be exercised under such power, as hereinafter shown.

The court has said:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a colonial Legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."
>
> *Wolff Packing Co. v. Court of Industrial Relations of State of Kan.*, 67 L. Ed. 759.

It has also been held by the highest courts of several states that the mining of coal is not clothed with a public interest.

The Supreme Court of Missouri, in *The State v. Loomis*, 22 S. W. 350, 115 Mo. 307, has said, in part, as follows:

> "Liberty, we have seen, includes the right to acquire property and that means and includes the right to make and enforce contracts. We do not say that such rights can-

not be regulated by general law, but we do say that the Legislature cannot single out one class of persons who are competent to contract and deprive them of rights in that respect which are accorded to other persons. The constitutional declaration, that no person shall be deprived of life, liberty or property without due process of law, was designed to protect and preserve their existing rights against arbitrary legislation as well as against arbitrary executive and judicial acts. The sections of our statute in question deprive a class of persons of the right to make and enforce ordinary contracts, and they introduce a system of state paternalism which is at war with the fundamental principles of our government, and, as we have before said, are not due process of law.

It cannot be said that these defendants, in operating their coal mines, are pursuing a public business, or that they have in any way, shape or form devoted their property to a public use, and this being so the cases of *Munn* v. *Illinois*, 94 U. S. 113-114, and *Budd* v. *New York*, 143 U. S. 517, are not in conflict with what we have said. On the contrary, the line of argument pursued in those cases goes far to show that a statute like the one in hand cannot stand. The many adjudications upholding police regulations need not be noticed, for it cannot be claimed that the law in question is of that character."

And in the great coal producing state of Illinois, its Supreme Court in *Millett* v. *Illinois*, 117 Ill. 294, in passing upon the very same question and having before it the well-known case of *Munn* v.

Illinois, 94 U. S. 113, said in clear and unmistakable language, in part, as follows:

> "The main reliance of the counsel representing the state, to sustain the ruling below, seems, however, to be on the ground that mining of coal is affected with a public use, so that it may be regulated by law, like public warehouses, as held in *Munn* v. *Illinois*, 94 U. S.: C., 4 Otto 113. It cannot be claimed that mining for coal was, by the common law, affected with a public use, and therefore specially regulated by law, like the business of inn-keepers, common carriers, millers, etc., and, in our opinion, it is not, like the business of public warehousing, within the principle controlling such classes of business. The public are not compelled to resort to mine owners any more than they are compelled to resort to the owners of wood, or turf, or even the owners of grain, domestic animals, or to those owning any of the other ordinary necessaries or conveniences of life which form a part of the commerce of the country. The owner of a coal mine is under no obligation to obtain a license from any public authority, and therefore when he chooses to mine his coal he exercises no franchise. We are aware of no case wherein it has been held that the owner or operator of a coal mine stands on a different footing, as respects the control and sale of his property, than the owner or operator of any other kind of property in general demand by the public."

The Supreme Court of West Virginia has also said that:

> "'Such legislation,' as is well said by the court, *In re Jacobs*, 98 N. Y. 114, 'may invade one class of rights today and another tomorrow, and, if it can be sanctioned under the construction, while far removed in time, we will not be away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances, regulated the movements and labor of artisans, the rate of wages, the price of food, and diet and clothing of the people, and a long range of other affairs long since, in all civilized lands, regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry, and cause a score of ills while attempting the removal of one.' * * * But, as said by Chancellor Kent (1 Kent Comm. 450), 'it is only by the free exercise of this power that courts of justice are enabled to repel assaults and protect every part of the government, and every member of the community, from undue and destructive innovations upon their charter rights'" (*State* v. *Goodwill*, 33 W. Va. 179).

The great state of Pennsylvania is, as the court well knows, another large coal-producing commonwealth, and its highest court has laid down the proposition in an interpretation of an Act similar

in part to the Court of Industrial Relations law that:

> "The Act is an infringement alike of the right of the employer and the employee; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States.
>
> He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void" (*Godcharles & Co.* v. *Wigeman*, 113 Pa. 437).

Judge Cooley in his Constitutional Limitations, 7th Edition, 876, shows that the business of coal mining is not within the classification of the various businesses which are affected with a public interest, and within the principle laid down in the Munn case:

> "(1) Where the business is one the following of which is not of right, but is permitted by the state as a privilege or franchise. Under this head would be comprised the business of setting up lotteries, of giving shows, etc., of keeping billiard tables for hire and of selling intoxicating drinks, when the sale by unlicensed parties is forbidden; also the cases of toll bridges. (2) Where the state, on public grounds, renders to the business special assistance, by taxation or otherwise.

(3) Where, for the accommodation of the business, some special use is allowed to be made of public property or of a public easement. (4) Where exclusive privileges are granted in consideration of some special return to be made to the public."

It is respectfully submitted that as the business of coal mining as shown heretofore does not come within a public use, therefore it cannot be impressed with a public interest.

Therefore, subdivision (3) of Section 3 of the Court of Industrial Relations Act is void, because the mere fiat of the Kansas Legislature cannot clothe the business of coal mining with a public interest, for the reasons heretofore shown.

As subdivision (3) of Section 3 of said Act contains the words of inclusion and jurisdiction of the business of coal mining within the purview of the Act, the remaining sections, and particularly Sections 17, 18 and 19, under which plaintiff in error was prosecuted, are void in so far as they refer to the coal mining industry.

Point II.

There can be no valid conviction and imprisonment in this case, because that part of the Act, Chapter 29, Kansas Special Session Laws, 1920, seeking to clothe the business of coal mining with a public interest being void, therefore, the attempted application of Sections 17, 18, 19 of said Act to plaintiff in error, with regard to a strike in a coal mine, is void as an arbitrary oppressive, unreasonable and unjust discrimination in violation of the due process clause of the Fourteenth Amendment to U. S. Constitution.

The plaintiff in error was charged with signing an order to some mine workers at Mine "H" of Mackie Fuel Company, notifyiny them of the order of the Executive Board of District 14 of the United Mine Workers of America to close work until one of their members, Carl Mishmash, had been paid the amount of money due him in accordance with the settlement made by the joint board of miners and operators. Sections 17, 18 and 19 of said Court of Industrial Relations Act sought to punish as a felony or misdemeanor the calling of a strike in a coal mine, and plaintiff in error was proceeded against under these sections in this case.

The Legislature, in the Act, did not limit its application to emergencies or to acts or omissions tending to limit or suspend the general coal supply. The applications of the criminal provisions of the Act in the instant case were made at a time of oversupply and consequent depression in

the coal mining industry, and at a time when the mines in that state were operating only on part time. The strike order affected but a minute part of the coal miners in that district, being applicable only to those of the Mackie Fuel Company. No attempt was made by the state to show that the cessation of work at the Mackie mine affected the health, comfort or morals of any part of the public.

The Act denies to employees in the coal mining industry and the officers of their organizations rights which it does not deny to others similarly situated.

Other employees and officers of other labor unions are left free to do with impunity the act for which plaintiff in error is condemned and imprisoned. Some, such as farmers, live stock raisers, wholesalers and retailers of food, fuel and clothing products, and the employees in said lines, are excluded, by Section 3, from the application of said Act.

In *Connelly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 22 Supreme Court 431, 46 L. E. 679, this court considered an Act of the state of Illinois prohibiting combinations of capital, or skill, to limit or reduce the production, or increase the price of commodities. In that case the statute said:

> "The provisions of this Act shall not apply to agricultural products or live stock, while in the hands of producer or raiser."

In an elaborate opinion, this court held this section to be repugnant to the Fourteenth Amend-

ment. This court also held that this section was so interwoven with other sections that its invalidity affected the entire Act.

In the instant case the Act is subject to the criticism quoted above and to the further criticism that it seeks to affect, regulate and define punishment for certain acts in the mining of coal in the state of Kansas, whereas those engaged in the ownership, operation or employment in the salt mines, for example, within the same state, are free to do with impunity the acts regulated or made criminal for those engaged in mining fuel.

In *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, this court held a statute of the state of Louisiana to be violative of the Fourteenth Amendment of the United States Constitution, for that it was an arbitrary classification of the sugar refining industry and submitted that business to drastic regulations not imposed upon others similarly situated. Sugar must be conceded to be more essential to the people of Kansas than certain kinds of fuel or certain articles of wearing apparel or particular articles of manufactured food. Yet the Act leaves the sugar wholesalers and retailers and their employees free to do acts that are denounced and made criminal in the industries placed under the Act.

In the case of *Connelly* v. *Union Sewer Pipe Co.*, 184 U. S. 540-563, this court further stated:

> "* * * It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall

be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

* * * * * *

"Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill, or acts, in respect of the sale or purchase of goods, merchandise, or commodities, whereby such combinations may, for their benefit, exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines are, under the statute, criminals, and subject to a fine, if they combine their capital, skill, or acts for the purpose of establishing, controlling, increasing, or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturalists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was

of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that state."

Also:

Allgeyer v. *Louisiana*, 165 U. S. 578.
Coppage v. *Kansas*, 236 U. S. 1.
Adair v. *U. S.*, 208 U. S. 161.
Adams v. *Tanner*, 244 U. S. 590.
Truax v. *Raich*, 239 U. S. 33.
Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229.
Colyer v. *Skeffington*, 265 Fed. 62.

Point III.

The Kansas Court of Industrial Relations Act is a violation of the liberty guaranteed under the Fourteenth Amendment, in that it destroys the right of employees to collectively cease work, and of the officers of labor organizations to issue a strike order.

In *Wolff Packing Co.* v. *Kansas Court of Industrial Relations* this court held that the Court of Industrial Relations could not fix wages in the packing industry. We submit that this holding should apply to the mining industry. If the Industrial Court cannot determine wages for the miners, the part of the Act seeking to make it a

crime to issue a strike order, as in the instant case, is an unlawful and unconstitutional interference with the liberty guaranteed by the Fourteenth Amendment.

The court said, in *Meyer* v. *Nebraska*, 67 L. Ed., l. c. 700:

> "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts."

If plaintiff in error, as an officer of a labor organization, may be imprisoned for issuing the order of the Executive Board of the union ordering a strike, he and those for whom he acts are unreasonably and unjustly denied a measure of freedom without which he and they are left helpless and defenseless in the face of oppressive acts of employers.

In *Wolff Packing Co.* v. *Kansas Court of Industrial Relations, supra,* this court further said, in reference to the Act in question here:

> "The employer is bound by this Act to pay the wages fixed; and while the worker is not required to work at the wages fixed, he is forbidden on penalty of fine or imprisonment to strike against them, and thus is compelled to give up that means of putting himself on

an equality with his employer which action in concert with his fellows gives him.

There is no authority of this court to sustain such exercise of power. * * *"

The Court of Industrial Relations Act attempts to make it a felony for officers of a labor organization in any of the affected industries to order a strike and to make it a misdemeanor for such employees to collectively cease work.

In the instant case the State's evidence shows that the Mine Workers' Union acted to enforce a payment of wages to one of its members from an operator who had refused for from eighteen months to two years to pay the amount awarded by the joint board of mine workers and mine operators.

This court in the Coppage case, *supra*, reviewed similar laws of Kansas and other states, all of which were, as there noted, unconstitutional, and refers particularly to *Adair* v. *Kansas*, 208 U. S. 161-174, which in part reads as follows:

> "While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a

> person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars, the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

Also in *Allgeyer* v. *Louisiana*, 165 U. S. 578-589, this court said:

> "The liberty mentioned in the Fourteenth Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to

pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

Point IV.

The Kansas Court of Industrial Relations Act violates Section 1 of Article 13 of the U. S. Constitution in compelling involuntary servitude.

The plaintiff in error respectfully urges that his conviction and sentence, under the Kansas Act in question, for issuing the strike order of the Executive Board of the Mine Workers Union, subjects him and the mine workers of Kansas to involuntary servitude. Section 18 and Section 19, threatening and imposing convictions for misdemeanors and felonies in the case of strikes, or the ordering of a strike, leave no choice, if the Act be valid, except to desist, even under the most unbearable conditions, from quitting work collectively, or be subjected to criminal prosecution. This Act, if permitted to stand, would reduce the plaintiff in error and other citizens similarly situated to a degree of serfdom and involuntary servitude that is violation of Section 1 of Article 13 of the U. S. Constitution.

POINT V.

The Act seeking to create the Court of Industrial Relations is void, as against the Fourteenth Amendment, because it is a penal statute that is too vague, indefinite and uncertain.

Sections 18 and 19 prescribe the penalties for violations of the provisions of the Act. They read as follows:

> "Sec. 18. Any person willfully violating the provisions of this act, or any valid order of said Court of Industrial Relations, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction of this state shall be punished by a fine of not to exceed $1,000, or by imprisonment in the county jail for a period not to exceed one year, or by both such fine and imprisonment.
>
> Sec. 19. Any officer of any corporation engaged in any of the industries, employments, utilities or common carriers herein named and specified, or any officer of any labor union or association of persons engaged as workers in any such industry, employment, utility or common carrier, or any employer of labor, coming within the provisions of this act, who shall willfully use the power, authority or influence incident to his official position, or to his position as an employer of others, and by such means shall intentionally influence, impel, or compel any other person to violate any of the provisions of this act, or any valid order of said Court of Industrial Relations, shall be deemed guilty of a felony and upon conviction

thereof in any court of competent jurisdiction shall be punished by a fine not to exceed $5,000, or by imprisonment in the state penitentiary at hard labor for a term not to exceed two years, or by both such fine and imprisonment."

The words "violate the provisions of this act or any valid order of said Court of Industrial Relations," in Sec. 18, and the same words, coupled with others, used in the conjunctive, of still broader purport, must be considered in connection with the various other sections and provisions. When so considered, it is manifest that the Act subjects citizens to imprisonments and fines for acts and under circumstances which are not defined or specifically denounced. A penal Act must make it clear and certain just what acts or omissions, if committed, will subject a citizen to punishment. The following references illustrate the vagueness, and indefiniteness of the act.

Sec. 6 subjects the employers and employees to the penalties for doing anything which tends to "hinder, delay, limit or suspend such continuous and efficient operation" if the prosecuting officials think the acts or omissions were done with that intent.

Under Sec. 7, the Court of Industrial Relations is authorized and directed to "make and serve upon all interested parties its findings, stating specifically the terms and conditions upon which said industry, employment, utility or common cerrier should be thereafter conducted in so far as the

matters determined by said court are concerned." The stresses and exigencies of competition, the lack of capital, or a thousand other moving causes, may conflict with, or obviate, full compliance with any such "finding" or "terms and conditions," but the employers and employees are compellable to hazard their liberty before a court and jury for failure to comply.

Sec. 8 and Sec. 9 refer to "such terms, conditions, rules, practices, wages, or standard of wages," and are subject to the same criticism, above, as Sec. 7.

Sec. 13, considered with the penalty sections, might make the bringing of an action at law or in equity, after thirty days from the time of service of the Industrial Court's order, a misdemeanor.

Secs. 15, 16 and 17, in particular, would, if valid, subject the employers and employees to criminal prosecution under terms so vague and indefinite that no man could know with certainty, when about to perform the acts, whether or not he was about to commit a crime. Every lay-off by employers and every cessation of work by employees, act to "delay, limit, or suspend the production," and every man is presumed to intend the consequences of his acts. Surely, the legislature did not intend there should be no change or adjustment whatever in any of the affected industries except upon permission of the Court of Industrial Relations being first had and obtained. Industry could not be so conducted. Then, who shall say, and who shall know, what acts and omissions are, or are not, made criminal?

The mere expression of any approval or disapproval concerning any employer, or his or its products, mere advertising or solicitation of almost any scope, criticisms of any kind, or mere trade associations, when related to employers or employees before the Court of Industrial Relations, may mean the county jail or State penitentiary. Where, in such matters, do the penal sections start to operate? Where is the line beyond which to transgress is a crime?

A perusal of Sec. 3 shows that, in its effort to exclude farmers, live-stock raisers and wool-growers from the terrors of the act, the legislature adopted such indefinite and vague terminology that, as to many lines of manufacture of food products or "all manner of wearing apparel in common use," the act is so vague and indefinite that inclusion or exclusion cannot be known with certainty. Lest it be contended that a review is permitted under the act, we ask, must the employers and employees risk their time, money and property through omitting to act, pending such review? The very omission to act, as the exigencies of the conduct of industry require, when the decision of the review cannot be known, may mean criminal prosecution.

In *Oklahoma Operating Co.* v. *Love*. 252 U. S., 331, speaking through Mr. Justice Brandeis, this court said:

> "Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the act relating to

the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates."

Ex parte Young, 209 U. S., 123, 147.
Mo. Pac. Ry. v. *Tucker*, 230 U. S., 340, 349.
Wadley Southern Rwy. v. *Georgia*, 235 U. S., 651, 652.

Considering a subpœna of the Court of Industrial Relations as one of its "lawful orders," does the refusal to obey the subpœna mean that the offender is to be prosecuted criminally, under Section 18? Surely the Act could be construed so as to make the punishment assessed against the plaintiff in error in the instant case a conviction and punishment by way of contempt, for the commission of a crime. Moreover, the interstate business in the mining of coal, as well as in meat-packing and the other affected industries, would by this Act of the Kansas Legislature be subjected to the unnecessary, unreasonable and unjust burdens and restraints of transacting business only as permitted by the Industrial Court, whenever the court saw fit to interfere. There is nothing in the Act to authorize the Industrial Court to order higher selling prices of coal, or meat, or wearing apparel, to compensate for any increased wages or operating expenses; and advanced selling prices, against interstate competition, would be a delusion. The treasury or taxing power of Kansas are not back of the employer or employees who suffer losses from the Industrial Courts rulings. But the penal sections, in their generalities and vagueness,

confront the employers and employees who fail to comply with "any valid order" of the Industrial Court.

So considered, the Act, as sought to be applied to the plaintiff in error, should be held as void *ab initio*.

Conclusion.

The plaintiff in error respectfully submits that his conviction and sentence to jail under the Court of Industrial Relations Act as it stood at that time is illegal and void and that such conviction and sentence is in violation of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States.

It is respectfully submitted that the judgment of the court below be reversed.

Very respectfully,

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JAN 9 19
WM. R. STAN
CL

No. 29,512.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 169.

AUGUST DORCHY, *Plaintiff in Error,*

vs.

THE STATE OF KANSAS, *Defendant in Error.*

In Error to the Supreme Court of the State of Kansas.

BRIEF OF DEFENDANT IN ERROR.

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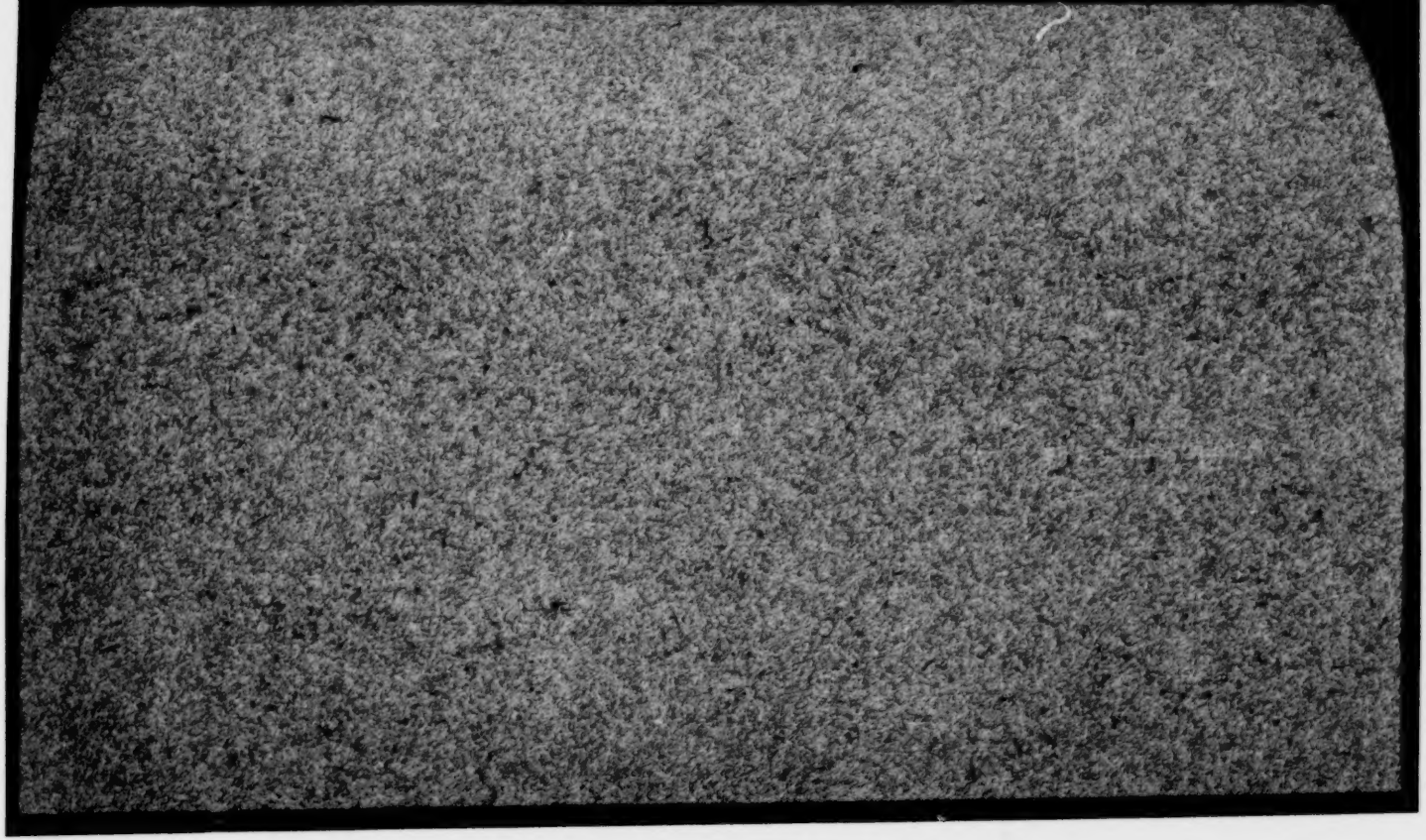

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This cause comes to this court on writ of error to the Supreme Court of the state of Kansas; it was numbered 24,174 in that court. The opinion was filed November 4, 1922, and affirmed on appeal the judgment of the district court of Cherokee county, Kansas. The opinion is reported in 112 Kan. 235, and refers, for the reasons of the decision, to the opinions in the cases of *The State, ex rel., v. Howat*, 109 Kan. 376; *The Court of Industrial Relations v. Packing Company*, 109 Kan. 629; and *The State, ex rel., v. Howat*, 109 Kan. 779.

In January, 1920, the legislature of the state of Kansas passed an act entitled, "An act creating the Court of Industrial Relations, defining its powers and duties, and relating thereto, abolishing the Public Utilities Commission, repealing all acts and parts of acts in

conflict therewith, and providing penalties for the violation of this act." It was approved by the governor January 23, 1920, and took effect by publication in the official state paper January 24, 1920.

Chapter 29, Laws of Kansas, Special Session 1920.

We quote sections 3, 6, 7, 9, 17, 18, 19 and 28 of the statute:

"SEC. 3. (*a*) The operation of the following-named and indicated employments, industries, public utilities and common carriers is hereby determined and declared to be affected with a public interest and therefore subject to supervision by the state as herein provided for the purpose of preserving the public peace, protecting the public health, preventing industrial strife, disorder and waste, and securing regular and orderly conduct of the businesses directly affecting the living conditions of the people of this state and in the promotion of the general welfare, to wit: (1) The manufacture or preparation of food products whereby, in any stage of the process, substances are being converted, either partially or wholly, from their natural state to a condition to be used as food for human beings; (2) The manufacture of clothing and all manner of wearing apparel in common use by the people of this state whereby, in any stage of the process, natural products are being converted, either partially or wholly, from their natural state to a condition to be used as such clothing and wearing apparel; (3) The mining or production of any substance or material in common use as fuel either for domestic, manufacturing, or transportation purposes; (4) The transportation of all food products and articles or substances entering into wearing apparel, or fuel, as aforesaid, from the place where produced to the place of manufacture or consumption; (5) All public utilities as defined by section 8329, and all common carriers as defined by section 8330 of the General Statutes of Kansas of 1915.

"(*b*) Any person, firm or corporation engaged in any such industry or employment, or in the operation of such public utility or common carrier, within the state of Kansas, either in the capacity of owner, officer, or worker, shall be subject to the provisions of this act, except as limited by the provisions of this act.

. . . . . .

"SEC. 6. It is hereby declared and determined to be necessary for the public peace, health and general welfare of the people of this state that the industries, employments, public utilities and

common carriers herein specified shall be operated with reasonable continuity and efficiency in order that the people of this state may live in peace and security, and be supplied with the necessaries of life. No person, firm, corporation, or association of persons shall in any manner or to any extent, wilfully hinder, delay, limit or suspend such continuous and efficient operation for the purpose of evading the purpose and intent of the provisions of this act; nor shall any person, firm, corporation, or association of persons do any act or neglect or refuse to perform any duty herein enjoined with the intent to hinder, delay, limit or suspend such continuous and efficient operation as aforesaid, except under the terms and conditions provided by this act.

"SEC. 7. In case of a controversy arising between employers and workers, or between groups or crafts of workers, engaged in any of said industries, employments, public utilities, or common carriers, if it shall appear to said Court of Industrial Relations that said controversy may endanger the continuity or efficiency of service of any of said industries, employments, public utilities or common carriers, or affect the production or transportation of the necessaries of life affected or produced by said industries or employments, or produce industrial strife, disorder or waste, or endanger the orderly operation of such industries, employments, public utilities or common carriers, and thereby endanger the public peace or threaten the public health, full power, authority and jurisdiction are hereby granted to said Court of Industrial Relations, upon its own initiative, to summon all necessary parties before it and to investigate said controversy, and to make such temporary findings and orders as may be necessary to preserve the public peace and welfare and to preserve and protect the status of the parties, property and public interests involved pending said investigations, and to take evidence and to examine all necessary records, and to investigate conditions surrounding the workers, and to consider the wages paid to labor and the return accruing to capital, and the rights and welfare of the public, and all other matters affecting the conduct of said industries, employments, public utilities or common carriers, and to settle and adjust all such controversies by such findings and orders as provided in this act. It is further made the duty of said Court of Industrial Relations, upon complaint of either party to such controversy, or upon complaint of any ten citizen taxpayers of the community in which such industries, employments, public utilities or common carriers are located, or upon the complaint of the attorney-

general of the state of Kansas, if it shall be made to appear to said court that the parties are unable to agree and that such controversy may endanger the continuity or efficiency of service of any of said industries, employments, public utilities or common carriers, or affect the production or transportation of the necessaries of life affected or produced by said industries or employments, or produce industrial strife, disorder or waste, or endanger the orderly operation of such industries, employments, public utilities or common carriers, and thereby endanger the public peace or threaten the public health, to proceed and investigate and determine said controversy in the same manner as though upon its own initiative. After the conclusion of any such hearing and investigation, and as expeditiously as possible, said Court of Industrial Relations shall make and serve upon all interested parties its findings, stating specifically the terms and conditions upon which said industry, employment, utility or common carrier should be thereafter conducted insofar as the matters determined by said court are concerned.

. . . . . .

"SEC. 9. It is hereby declared necessary for the promotion of the general welfare that workers engaged in any of said industries, employments, utilities or common carriers shall receive at all times a fair wage and have healthful and moral surroundings while engaged in such labor; and that capital invested therein shall receive at all times a fair rate of return to the owners thereof. The right of every person to make his own choice of employment and to make and carry out fair, just and reasonable contracts and agreements of employment, is hereby recognized. If, during the continuance of any such employment, the terms or conditions of any such contract or agreement hereafter entered into, are by said court, in any action or proceeding properly before it under the provisions of this act, found to be unfair, unjust or unreasonable, said Court of Industrial Relations may by proper order so modify the terms and conditions thereof so that they will be and remain fair, just and reasonable and all such orders shall be enforced as in this act provided.

. . . . . .

"SEC. 17. It shall be unlawful for any person, firm or corporation, or for any association of persons, to do or perform any act forbidden, or to fail or refuse to perform any act or duty enjoined by the provisions of this act, or to conspire or confederate with others to do or perform any act forbidden, or to fail or refuse to

perform any act or duty enjoined by the provisions of this act, or to induce or intimidate any person, firm or corporation engaged in any of said industries, employments, utilities or common carriers to do any act forbidden, or to fail or refuse to perform any act or duty enjoined by the provisions of this act, for the purpose or with the intent to hinder, delay, limit, or suspend the operation of any of the industries, employments, utilities or common carriers herein specified or indicated, or to delay, limit, or suspend the production or transportation of the products of such industries, or employments, or the service of such utilities or common carriers: *Provided*, That nothing in this act shall be construed as restricting the right of any individual employee engaged in the operation of any such industry, employment, public utility, or common carrier to quit his employment at any time, but it shall be unlawful for any such individual employee or other person to conspire with other persons to quit their employment or to induce other persons to quit their employment for the purpose of hindering, delaying, interfering with, or suspending the operation of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act, or for any person to engage in what is known as "picketing," or to intimidate by threats, abuse, or in any other manner, any person or persons with intent to induce such person or persons to quit such employment, or for the purpose of deterring or preventing any other person or persons from accepting employment or from remaining in the employ of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act.

"SEC. 18. Any person wilfully violating the provisions of this act, or any valid order of said Court of Industrial Relations, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction of this state shall be punished by a fine of not to exceed $1,000, or by imprisonment in the county jail for a period of not to exceed one year, or by both such fine and imprisonment.

"SEC. 19. Any officer of any corporation engaged in any of the industries, employments, utilities or common carriers herein named and specified, or any officer of any labor union or association of persons engaged as workers in any such industry, employment, utility or common carrier, or any employer of labor, coming within the provisions of this act, who shall wilfully use the power, authority or influence incident to his official position, or to his position as an

employer of others, and by such means shall intentionally influence, impel, or compel any other person to violate any of the provisions of this act, or any valid order of said Court of Industrial Relations, shall be deemed guilty of a felony and upon conviction thereof in any court of competent jurisdiction shall be punished by a fine not to exceed $5,000, or by imprisonment in the state penitentiary at hard labor for a term not to exceed two years, or by both such fine and imprisonment.

. . . . . .

"SEC. 28. If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court."

Later in this statement we sketch the history of the conditions in the coal-mining industry in Cherokee and Crawford counties, Kansas, which led to the enactment of this statute.

The complaint in the case was filed February 17, 1921 (Rec. 8), and was followed in due time by the filing of the information.

The complaints and informations were filed against Alexander Howat and August Dorchy.

There were two counts in the information. (Rec. 13, 15.)

The first count in the information charged, in substance, that on or about February 3, 1921, the coal mine known as Mine H, operated by the George K. Mackie Fuel Company, situated in Cherokee county, Kansas, was in operation for the purpose of the mining and production of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in the state of Kansas.

That on or about that date there existed in that county a labor union, or association of persons, engaged as workers in the employment of maintaining and operating coal mines in that county, including that mine, for the purpose of and in the mining and production of coal for and in common use as fuel for domestic, manufac-

turing and transportation purposes in Kansas. Said labor union was known as District No. 14, United Mine Workers of America. The defendant, Alexander Howat, was then an officer and president of that labor union, and the defendant, August Dorchy, was then an officer and vice president of that labor union. That at that time certain persons, known as Owen Pryor, William Coleman, Ab Brown, Horace Dixon, William Richardson and George Young, and many others whose names were unknown to the attorney-general and county attorney, were members of said labor union in that county and were then engaged as mine workers and employed by said George K. Mackie Fuel Company at said Mine H in said county and state in the maintenance and operation of that coal mine for the purposes aforesaid.

That on or about February 3, 1921, the defendants Alexander Howat and August Dorchy, each willfully, intentionally, unlawfully and feloniously used their power, authority and influence incident to his official position with said labor union—that is, Alexander Howat as an officer and president, and August Dorchy as an officer and vice president—to each willfully, intentionally, unlawfully and feloniously influence and impel said Owen Pryor and said other persons named and not named, who were then engaged as workers and employed in the maintenance and operation of that mine for the purposes aforesaid, to willfully, intentionally and unlawfully cease their work, and said persons did, pursuant to and by reason of said influencing and impelling by said defendants, intentionally, willfully and unlawfully cease their work in maintaining and operating said coal mine for the production of coal therefrom, and such influencing and impelling of said persons by the defendants, and said ceasing of work by said persons were for the purpose to hinder, delay, limit and suspend the continuous and efficient operation of said mine with reasonable continuity and efficiency for the mining and production

of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in Kansas, and for the purpose of evading the provisions of chapter 29, Special Session Laws of Kansas, 1920, and to obstruct, hinder and prevent the people of Kansas from living in peace and security and from being supplied with coal and the necessaries of life, "and that such ceasing of work by said persons, who ceased said work as aforesaid, was not an individual quitting of work by said persons, or an individual act of said persons, for the purpose of exercising any individual right, but was for the unlawful purposes aforesaid."

The second count followed closely the allegations in the first count, but varied from it in alleging a conspiracy. It alleged that the defendants, as an officer and president and vice president, respectively, of said labor union, did willfully, intentionally, unlawfully and feloniously influence and impel the said Owen Pryor and said other persons named and unnamed, who were then engaged as workers and employed in the maintenance and operation of said coal Mine H for the purposes aforesaid, "to intentionally, willfully, and unlawfully conspire with each other and with said defendants in said county and said state to, and such persons, so influenced and impelled by said defendants, pursuant to and by reason of said influencing and impelling by said defendants and said conspiracy, did intentionally, willfully and unlawfully cease their work in maintaining and operating said coal mine for the production of coal therefrom, and said influencing and impelling of said persons by said defendants and said conspiracy, acts and conduct of said persons were for the purpose to hinder, delay, interfere with, limit and suspend the operation of said mine for the mining and production of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in the state of Kansas, and for the purpose of evading the provisions of chapter 29 of the Special Session

Laws of Kansas 1920, and to obstruct, hinder and prevent the people of the state of Kansas from living in peace and security, and from being supplied with coal and the necessaries of life, and that said ceasing of work by said persons who ceased work as aforesaid was not an individual quitting of employment by any of said persons, or an individual act of said persons, for the purpose of exercising any individual right, but was for the unlawful purpose aforesaid."

Each count charged, at the close, the said acts were contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Kansas.

Each count charged a felony under section 19 of the act, in that each defendant was alleged to have willfully used power, authority and influence incident to his official position as an officer of the labor union, and by such means intentionally influenced and impelled other persons to violate the provisions of section 17 of the act. Each count, however, included allegations which charged a misdemeanor under section 17 of the act.

A motion to quash the information was filed June 27, 1921. (Rec. 17.)

This motion was overruled June 27, 1921. (Rec. 19.)

The trial of the case was begun June 27 and the verdict returned July 1, 1921. (Rec. 3, 4.)

The verdict of the jury, as to this defendant, omitting the caption, was as follows:

> "We, the jury, duly empaneled and sworn to try the issues joined in the above-entitled cause, do on our oaths find the defendant August Dorchy guilty of a misdemeanor, in that said defendant did willfully hinder, delay, limit and suspend the operation of coal Mine H of the George K. Mackie Fuel Company, in violation of chapter 29 of the Laws of Kansas of the Special Session 1920; committed all in manner and form as charged in the information in this case."

It was signed by the foreman. (Rec. 29.) The same form of verdict was returned against Alexander Howat, the other defendant, although it does not appear in this record.

A motion for new trial was filed and overruled. (Rec. 32, 33.)

On July 8, 1921, the court, upon the verdicts of guilty, sentenced August Dorchy and his codefendant, Alexander Howat, each to confinement in the county jail in Cherokee county, Kansas, for the period of six months, and each to pay a fine to the state of Kansas in the sum of $500 and to pay the costs of the prosecution, and to be committed until said costs and fines were paid. (Rec. 4.) An appeal was taken by each of the two defendants, to the Supreme Court of the state of Kansas from the judgment of the district court of Cherokee county. (Rec. 34, 35.) Alexander Howat dismissed his appeal, and afterwards sought to have it reinstated, and the reinstatement was refused; but these two steps of Howat do not appear in the record.

The judgment of the district court of Cherokee county was affirmed by the Supreme Court of Kansas, November 4, 1922, 112 Kan. 235. (Rec. 48, 49.) A petition for rehearing was filed in the Supreme Court of Kansas (Rec. 50), and was by it overruled. (Rec. 57.)

A petition for writ of error to the Supreme Court of the United States was filed in the Supreme Court of Kansas (Rec. 58), and an order allowing the writ of error was made by W. A. Johnston, chief justice of the Supreme Court of Kansas. (Rec. 60.)

A writ of error was issued, citation served, and the record transmitted to the Supreme Court of the United States. (Rec. 65-67.)

Mine H of the George K. Mackie Fuel Company, situated in Cherokee county, Kansas, was running prior to February 4, 1921, and producing coal for railroad and manufacturing purposes. It was located about three and a half miles northwest of Scammon.

The mine produced from 140 to 146 tons of coal per day. The Fuel Company shipped coal from the mine to various points in Kansas for railroads and salt and packing plants. (Rec. 37, 38, 45, 46, 47.)

There were 46 men employed at the mine who were members of the United Mine Workers of America. There was a full force on February 3. (Rec. 45, 47.)

The Local Union No. 498 met at Scammon on the night of February 3, 1921. Alexander Howat and August Dorchy were present. Howat produced a strike order and it was read to the meeting. Howat handed it to George Young, one of the workmen at Mine H, and a member and secretary and treasurer of the local union, and told Young to take it to the mine and read it in the morning. The next morning Young took the order to the mine, got there about 6:30 a. m., and read the order to the assembled miners, about 40 or 45 being present. The men all quit after reading the order, and Young notified the foreman, George Jenkins, there would be no work there that day and none until the Mishmash claim was paid, that he expected to stop the mine until the claim was paid. The strike was called for the purpose of collecting the Mishmash claim. Young knew that the men would quit when he read the order to them, and that the mining operation would stop. (Rec. 44, 45, 37.)

The strike order, marked "Exhibit A," is set out at pages 36 and 37 of the record, and we quote it as follows:

> PITTSBURG, KANSAS, February 3, 1921.
>
> To the men employed at the mines of the Mackie Fuel Company:
>
> This is to advise you that we are authorized and directed by our executive Board to notify you to cease work beginning Friday Morning, February 4, 1921, until such time as the company pays Brother Carl Mishmash the amount of money due him in accordance with the settlement made by the Joint

Board of miners and operators in this case. This case has been settled by the Joint Board of Miners and Operators, but the company refuses to comply with the settlement that has been made and refuses to pay Brother Mishmash any part of the money that is due him.

We sincerely hope that the men employed at the mines of this company will respond to the call of duty and stand united as one man until such time as this company carries out the agreement that has been made by the Joint Board of Miners and Operators. When we make a satisfactory settlement of the question in dispute you will be notified from this office of the same.

With kind regards, we are, Yours very truly, Alexander Howat, President District No. 14.

AUGUST DORCHY, *Vice President.*

On the morning of February 4 the men employed by the company, 45 or 46 in number, assembled at the mine at about 6:30 and then left, carrying their dinner pails with them. (Rec. 45.) The men quit because of the strike order signed by Howat and Dorchy. This caused a stoppage of production. The Fuel Company could not replace the men. Some of the men came back on February 9 to clean up the coal. They got their pay for the coal thus cleaned up in that way. On February 23 the men resumed work and the mine resumed full operation. The foreman told Jack Morton, the superintendent of the mine, that the men quit work to collect the Mishmash claim. This amount, Morton understood, was $180. The money was paid to Mishmash by the Fuel Company, pursuant to order of the Industrial Court, and after that the men came back to work on February 23, 1921. (Rec. 47.) The miners quit for the purpose of forcing the company to pay the Mishmash claim, and they all went back to work after it was paid. (Rec. 45, 46, 47.)

George Young, one of the miners who stopped work, was secretary and treasurer of the local union of the United Mine Workers of America. He, together with John McNally, another one of the

workers who stopped work, the two acting as a committee for the workmen, told George Jenkins, the foreman of the mine, on the morning of February 4, that the men had quit and that the mine would be shut down and that there would be no work there until the claim of the Mishmash boy was paid. (Rec. 38, 39, 40, 41, 42, 44, 45, 46.)

The whistle at the mine blew for the men to come to work on the morning of the 4th, the 5th and the 8th of February. (Rec. 39.) No work was done on or after February 4 until February 23, excepting some work of cleaning up coal, in order to get paid for the coal thus cleaned up by the miners, on February 9. (Rec. 39, 40.) On and after February 23 the mine was in operation again. (Rec. 40.)

Alexander Howat said to the court, in a statement before sentence, which statement Dorchy said he approved, that the strike order was made and the strike called by Howat and Dorchy to compel the George K. Mackie Fuel Company to pay the Mishmash claim. (Rec. 47.) No evidence was introduced by the defendant. (Rec. 47.)

The record does not show that Carl Mishmash was employed by the Mackie Fuel Company at the time the strike was called, or that Alexander Howat or August Dorchy were employed by the Fuel Company at any time. The facts are—and about them there can be no dispute, although not shown by the record—that Mishmash was not then and had not been employed by the Fuel Company for about a year and a half before the strike, and that Howat and Dorchy had never been employed by the Fuel Company.

To understand the reason for the enactment of the statute in question, it is necessary to state the history of conditions in the coal-mining fields in Crawford and Cherokee counties, Kansas, for some time prior to the passage of the statute. This history

does not appear in the record, but the court will take judicial notice of it.

Of the coal produced in the state of Kansas, that mined in Crawford and Cherokee counties was about 93 per cent. The total coal produced and mined in Kansas was about 65 per cent of the total coal consumption in the state. Coal was shipped in from Colorado, New Mexico, Oklahoma, Arkansas and Illinois, to fill out the supply required by the people of the state. The long extra haul on the transportation of this coal from other states added materially to its price and made its cost substantially higher than that of the coal produced in Kansas, allowing for differences in quality. The coal produced in the Crawford and Cherokee county fields was excellent for steaming purposes and was useful and in active demand for all purposes.

For about thirteen years prior to 1920 the number and frequency of strikes at coal mines in southeastern Kansas had been growing. Most of them were called on trifling pretexts, which varied in character. Strikes would be called and the mines shut down for a few days or few weeks.

A general strike at all the mines of the district was called November 1, 1919, and lasted until near the end of the year. It was part of a strike of bituminous coal miners throughout the country, for the purpose of obtaining a 60 per cent increase of wages, a six-hour day, and a five-day week. On this general strike, President Wilson issued a public statement, in which he said:

> "From whatever angle the subject may be viewed, it is apparent that such a strike in such circumstances would be the most far-reaching plan ever presented in this country to limit the facilities of production and distribution of a necessity of life and thus indirectly to restrict the production and distribution of all the necessaries of life. A strike under these circumstances is not only unjustifiable, it is unlawful . . . I feel it my duty in the public interest to declare that any at-

tempt to carry out the purposes of this strike and thus to paralyze the industries of the country with the consequent suffering and distress of all our people, must be considered a great moral and a legal wrong against the Government and the people of the United States."

New York *Times*, Oct. 26, 1919, sec. 1, p. 1.
Strikes and the Law, by Philip Wager Lowry.
21 Columbia Law Review, 1921, p. 783.

What occurred is clearly stated in the opinion of the Supreme Court of the state in the case of *The State of Kansas, ex rel. Hopkins, Attorney-general, v. Alexander Howat et al.*, in which case August Dorchy was one of the defendants (109 Kan. 376, 401, 402, Case No. 23,505):

"Under this form of civil government there were 705 strikes in the coal mines of Kansas within a period of less than four years ending December 31, 1919. In the winter of 1919-'20 the purposes of the national strike were attempted to be carried out in District No. 14. The threatened consequences were so dire that the state took action in this court, under the anti-trust statute, and the court appointed receivers for the coal mines. The receivers encountered difficulty in securing competent managing operators, because those who were familiar with the mines and methods of coal production in that district feared they might not survive an attempt to supply the people of the state with fuel. With splendid heroism, ex-service men, college students, and others of patriotic mold, volunteered to do the work. Prudence demanded they be given military protection, and a regiment of the Kansas National Guard was sent with them to the mines. General Wood also stationed a troop of regular army soldiers in the vicinity. On the way to Pittsburg, movement of the state troop train was insufferably delayed, until a sharp order to proceed was given. Then the train was wrecked. After the volunteers and their military escort arrived at Pittsburg some sniping occurred, but without fatality, some mining machinery was disabled, and some hidden stores of dynamite were discovered. The determined character of the coal-producing enterprise seems then to have been appreciated, and further violence was not offered. The sub-

limate cruelty of the strike method, however, was displayed in the treatment of the Pittsburg hospital. It was surrounded with coal mines. There were 15,000 idle miners in the district. The hospital was filled with sick, many of whom were miners, and the winter weather was severely cold. Coal was denied to this hospital by the strikers, although deprivation for a single day meant death to patients."

As a result of the state's intervention some coal was produced from strip mines, which to some extent alleviated the distress from the shortage of the coal supply. The strike being general, the supply of coal from outside of the state was at the same time practically eliminated.

When the legislature met in special session in January, 1920, it went into a full investigation of the situation, at which information was furnished and arguments were made from all sides of the controversy, including, among others, the coal-mine operators and the coal miners, and as a result it enacted the statute in question. Part of the information before it was that during the period from April 1, 1916, to December 31, 1919, a period of forty-five months, there were 705 strikes in the territory within the jurisdiction of District No. 14, United Mine Workers of America, in Crawford and Cherokee counties, Kansas. Most of these strikes were called without any but a trifling pretext. As a result the employees lost 799,194 working days and $3,866,780.24 in wages, and gained in money concessions $852.83. The strike of November and December, 1919, while larger in its scope than the prior strikes, which had been steadily increasing for years, was merely the culmination of the scheme of District No. 14 and its officers to dominate and control the coal industry of southeastern Kansas, and determine when and under what conditions mines could operate and when the people of the state might be supplied with coal and when they should be deprived

of coal, when the industries of the state might operate, and when they must stop operation for lack of coal.

The situation in November and December, 1919, was more acute than it had formerly been, but it was part of a chronic and increasing evil and danger to the state.

July 1, 1919, a strike was called by the order of Alexander Howat, president of District No. 14 of United Mine Workers of America, of the mine workers at the mines of the Central Coal and Coke Company in the southeastern Kansas mining district. Nine hundred and twenty-five men struck and the mines were shut down for about six months. No reason was ever given for this strike, on behalf of the strikers, to the Central Coal and Coke Company. The state labor commissioner and *ex officio* mine inspector endeavored in vain to ascertain from Alexander Howat the occasion for the calling of the strike.

The only miners in the district were members of District No. 14, United Mine Workers of America. At each mine there was a local union and no man could be employed as a miner thereat unless he was admitted to membership in the local union, which as a result controlled the employment of men at the mine. As a result of careless mining work by the employees, the amount of slack produced in these mines in southeastern Kansas increased from about 25 per cent, which it had been in 1916, to about 50 per cent, which is was in 1919. Slack coal, of course, was less valuable than the lump and nut coal and sold for a much lower price. The result was to increase the price of lump and nut coal and lessen the utility of the total coal mined. Within the last two years the percentage of slack coal has been reduced, and it is now about 35 per cent.

With the history before it, the legislature enacted the statute.

Questions concerning the validity of provisions of the statute were soon before the local courts and the Supreme Court.

On April 9, 1920, Alexander Howat, August Dorchy and two others were adjudged guilty of contempt by the district court of Crawford county, for failing to obey the order of the district court requiring them to appear as witnesses before the Court of Industrial Relations in an investigation by it relating to conditions existing in the mining industry in Cherokee and Crawford counties. They were committed to jail until they should submit to be sworn and testify in the proceedings, and they appealed to the Supreme Court of the state. The opinion of that court, sustaining the act against the points raised against it, appears in 107 Kan. 423, case No. 23,013.

April 5, 1920, an action was brought by the state, on the relation of the attorney-general, in the district court of Crawford county, Kansas, against the officers of District No. 14 of the United Mine Workers of America, including Alexander Howat, president, August Dorchy, vice president, and others, to enjoin them from interfering with the operation of coal mines in Crawford, Cherokee and Osage counties, Kansas, and causing the production of coal to be delayed, hindered and stopped. September 14, 1920, the district court of Crawford county issued a permanent injunction against those defendants, restraining them, among other things, from directing, ordering or in any manner bringing about the hindering, delaying, interference with or suspension of the operation of any coal mines in those counties, and from causing the miners or members of that labor union to quit their work at said mines for the purpose of hindering, delaying, interfering with or suspending the operation of any coal mines in those counties. On February 3, 1921, those defendants called the strike in question at Mine H of the Mackie Fuel Company in Cherokee county, and which included another mine of the same company situated in Crawford county. On February 7, 1921, an affidavit was filed by the attorney-general and county attorney in Crawford county, charging those

defendants with contempt of court in violating the injunction, and after notice, the filing of an accusation against the defendants, and a hearing, the court found these defendants, including Howat and Dorchy, to be guilty of a violation of the injunction and contempt of court, and ordered that they be confined in the county jail of Crawford county for one year, and to pay the costs of prosecution. The opinion appears in *The State of Kansas, ex rel. Hopkins, Attorney-general, v. Howat et al.*, 109 Kan. 376. In the opinion the court said:

> "The constitution and by-laws of District No. 14 had been amended to impose a fine of $50 for each offense, on any member, committee or local officer who would be privy to referring a controversy to the Court of Industrial Relations, and imposing a fine of $5,000 on any district officer of District No. 14 who would be a party to the reference of any grievance to the Court of Industrial Relations. These amendments enabled Howat and his associates to impose their will on mine workers. Without continuous and effective operation of the coal mines, all the loss, suffering and irreparable injury of the coal strike of December, 1919, fresh in the minds of the people and of the defendants, would be repeated; and the state was without adequate remedy at law." (pp. 379, 380 *id.*)

The Supreme Court also said, referring to the district court:

> "The court found that all the perils to the public welfare which accompanied the coal strike of the winter of 1919-'20 would again be incurred. That strike caused industry to stop, caused commerce to be demoralized, caused food supplies to be reduced and cut off, caused schools to close, caused suffering in homes; and if the defendants had been permitted to have their way, would have caused the sick to languish and die in unwarmed hospital beds in the dead of winter. If those consequences were produced in a single village by blocking the highway over which necessaries of life were brought in, anybody would say blocking the highway was a public nuisance and a court of equity could open the road. Multiplicity and magnitude of threatened disaster do not detract from the authority of the court of equity over the few determined in-

> dividuals who propose to wreak the disaster. Ability of the defendants to paralyze the normal activities of a whole commonwealth would not free them from amenability to injunction. The district court was warranted in interfering on principles identical with those applied in abatement of public nuisances, and the court was not shorn of power because the defendants, if they persisted, would incidentally be guilty of crime."

The Supreme Court of the state also held that the injunction was rightfully issued, on the ground that the state, by the calling of the strikes in the coal mines, would be prejudiced in the use of property which it held as owner; that is, that it could not get coal for the various educational, charitable and correctional institutions owned and maintained by the state. (p. 386 *id.*)

The injunction was sustained on the general equity power of the court and the protective power of the state, independently of the statute in question.

The judgment of the district court in the case above referred to, in 107 Kan. 423, and that in 109 Kan. 376, having been sustained by the Supreme Court of the state, writs of error were taken to this court.

The two cases were heard together in this court and a decision rendered March 13, 1922:

Alexander Howat, August Dorchy, Thomas Harvey and Robert B. Foster v. State of Kansas (No. 154).

Alexander Howat, August Dorchy, James McIlwrath, et al., v. State of Kansas (No. 491), 258 U. S. 181; 66 L. Ed. 550, 42 Sup. Ct. R. 277.

The writs of error were dismissed.

Alexander Howat and August Dorchy and other officers of District No. 14, having called a strike about March 21, 1921, at a strip mine of the Patton Coal and Mining Company in Crawford county,

Kansas, to compel the company to operate at the mine two steam shovels and two crews of men instead of one steam shovel and one crew of men, the court, on April 8, 1921, found Alexander Howat guilty of contempt for violation of the injunction which had been issued by the court September 14, 1920, hereinbefore referred to, and fined him. He took an appeal to the Supreme Court of the state, and that court affirmed the judgment of the district court. The opinion was filed November 12, 1921.

The State of Kansas, ex rel. Hopkins, Attorney-general, v. Alexander Howat et al., 109 Kan. 779 (No. 23,573).

In the appendix to this brief are contained:

(*a*) Proclamation of Governor Allen calling National Guard into service for protection of coal mining operations.

(*b*) Call of Governor Allen for volunteers to dig coal.

(*c*) Proclamation of Governor Allen convening the legislature in special session.

(*d*) Excerpt from the message of Governor Allen to the legislature of January 5, 1920.

ARGUMENT.

I.

The Only Assignments of Error Which This Court Should Consider.

The assignments of error on the writ of error from this court to the Supreme Court of the state of Kansas are found commencing at page 61 of the record.

Assignments I and II specify that the Supreme Court of the state of Kansas erred in holding that the numerous invalid sections of the Industrial Court act did not invalidate the whole act. These assignments have been abandoned in the specifications of error in the brief of the plaintiff in error.

Assignment III covers conflict with the Clayton act, on the ground that that act makes peaceful picketing lawful. This assignment has been abandoned in the brief.

Assignment IV involves conflict with the Lever act, which has now been abandoned.

Assignment V states the decision of the Supreme Court of the state of Kansas is at variance with the decision of the highest courts of the states and the federal appellate courts as to the rights of the legislature to interfere with personal liberty, regulation of wages, freedom of contract and the right to strike, and the right to picket under their constitutions and the constitutions of the United States. This, of course, presents no question for review, as this court is not vested with power to harmonize state decisions and federal appellate decisions. The question is whether or not the act as it affects the plaintiff in error is violative of the constitution of the United States.

Assignment of error VI deals with violation of section 1 of the thirteenth amendment to the federal constitution. While this

contention is briefly set forth under "point IV," page 23 of plaintiff in error's brief, it is not covered by any of the specifications of error set forth on pages 6 and 7 of the brief.

Assignment of error VII covers violation of the fifteenth amendment to the constitution. This has been abandoned in the brief.

Assignment of error VIII involves the commingling of legislative, executive and judicial powers of government in one body. This has been abandoned in the brief.

Assignment of error IX claims an encroachment on the constitutional rights of plaintiff in error because the decision of the Supreme Court of Kansas requires plaintiff in error to obey a statute which is unconstitutional and void. This assignment is too general and is not well taken, and it does not specify that the act is claimed to be in violation of federal constitution.

Assignment X claims error on the ground that the Supreme Court of the state recited that the constitutional rights of the plaintiff in error under the federal constitution were not brought into question in the instant case. This assignment is too general, and as we understand the decisions of this court, will not be reviewed here.

Assignment XI complains that the Supreme Court of Kansas erred in not holding the act in question constituted class legislation, unjust and illegal discrimination, and arbitrary and unreasonable classification in violation of the "due process" clause of the fourteenth amendment of the federal constitution. This is attempted to be raised under the first specification of error in plaintiff in error's brief (p. 6), but the real contention of the plaintiff in error in this respect is as to classification under the "equal protection clause" of the fourteenth amendment. Nowhere in the assignments of error or in the specifications of error as found in the plaintiff in error's brief is the question of violation of the "equal protection clause" of the fourteenth amendment raised.

Assignment of error XII involves the power of the legislature to make it a crime to strike, to picket, or as an officer of the labor union to compel or direct others to strike or to peacefully picket, and also that the conviction and sentence of the plaintiff in error was a violation of his right of free speech as guaranteed to him under the constitution of the United States. As the jury specifically acquitted the plaintiff in error of the charge against him as an officer of the labor union, that part of the assignment of error XII is not well taken. So far as the act involves violation of the right of free speech, it has been abandoned in the brief. The question of the right to picket is not in this case, as the plaintiff in error was not convicted of picketing. So the only thing left of this assignment for review is whether or not the legislature had power to make it a crime to strike. However, that is not involved here, as the plaintiff in error was not charged with striking, but was charged, in effect, with inducing others to strike, and conspiring with others to strike, for the purpose of hindering, delaying, limiting and suspending the continuous production of coal. There are no other assignments of error in the record.

Of the five specifications of error set forth on pages 6 and 7 of plaintiff in error's brief, the "second" does not complain that the act is violative of the federal constitution, and under the decisions of this court no question in that respect is represented here for review. The same is also true of the third and fourth specifications of error. In addition, the third specification of error raised no federal constitutional question, because the error complained of is that there was no violation of section 17 of the Court of Industrial Relations act. Whether or not there was a violation of such section is a state question to be determined by the Supreme Court of Kansas. It is not charged in the third specification of error that section 17 violates the federal constitution in any respect. The

same observation is true of the fourth, which charges that the district court of Cherokee county was without jurisdiction to commit plaintiff in error to jail, as the plaintiff in error was not guilty of a misdemeanor or any other crime. This involves solely a question for the determination of the highest court of the state. No claim is made in this specification that section 18 of the act violates the federal constitution in any respect.

The fifth and last specification of error complains that the legislature of the state of Kansas may not make it a crime for an officer of the labor organization to call a strike in a coal mine, because the business of coal mining is not clothed with the public interest, and therefore, such an act violates the "due process" clause of the fourteenth amendment. As the plaintiff in error was not convicted of acting as an officer of a labor organization, the question is not here for review. The jury acquitted him of acting as an officer of a labor organization. The fifth specification of error, therefore, presents no question for the determination of this court.

Of the five specifications of error set out in the brief, only one of them, to wit, the first, presents any question reviewable by this court, and that question is whether or not the judgment of the district court denies due process of law as guaranteed to the plaintiff in error by the fourteenth amendment of the constitution. Although under point 11 of the brief, cases are cited on the ground that the act in question is arbitrary and unreasonable classification violating the "equal protection" clause of the fourteenth amendment, no such assignment of error is found either in the record or in the specifications of error set out in plaintiff in error's brief. The two clauses are not coextensive.

Truax v. Corrigan, 250 U. S. 312.

The specifications of error in the brief differ from the assignments of error in the record.

II.

Have the Constitutional Rights of Plaintiff in Error Been So Invaded That He Can Raise the Points Set Out in His Brief?

It has been decided by this court many times that a defendant can only object to such parts of an act or proceedings taken as affect him personally. He is not permitted to raise generally the unconstitutionality of an act of congress or of the legislature of a state.

The latest expression of this court on this point is in *Massachusetts v. Mellon*, 262 U. S. --, 43 S. Ct. 601 (June 4, 1923):

> "We have no power *per se* to review and annul acts of congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justifiable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."

While the above language was used in reference to an act of congress, yet the rule is the same in regard to the act of a state.

This court, in *Smiley v. Kansas*, 196 U. S. 447, 25 S. Ct. 289, decided this point in construing the monopoly statute of that state. Smiley had been convicted of violating that act by inducing certain dealers in grain to maintain a fixed price for grain in a certain town in that state. He was not a grain dealer and got no personal benefit from what he did. He challenged the unconstitutionality

of the act as a whole, but this court held that what he did came plainly within the terms of the act, whether other portions of it were valid or invalid. This court then quoted with approval the following language from the opinion of the Supreme Court of Kansas in that case:

> "He cannot be heard to object to the statute merely because it operates oppressively upon others. The hurt must be to himself. The case, under appellant's contention as to this point, is not a case of favoritism in the law. It is not a case of exclusion of classes who ought to have been included, the leaving out of which constitutes a denial of the equal protection of the law, but it is the opposite of that. It is a case of the inclusion of those who ought to have been excluded. Hence, unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint. This is fundamental and decisively settled." (Citing cases.)

Dorchy was charged with violating section 19 of the Industrial Court act, which makes it a felony for an officer of a labor union to influence, impel or compel any other person to violate any of the provisions of the Industrial Court act. He was acquitted by the jury on this charge, so he cannot complain of anything contained in that section. He was charged and convicted of a misdemeanor under section 17 of the act, for inducing and conspiring with certain employees of the Mackie Fuel Company to strike, with intent to hinder, delay, limit and suspend the operation of a plant engaged in the mining of coal, the mining of coal being one of the industries designated in section 3, declared to be affected with a public interest.

While the act permits any individual employee to quit his employment at any time, it declares it to be unlawful for any person, including an employee, to induce or conspire with other persons to quit their employment for the purpose of hindering, delaying, or

interfering with or suspending the operation of the industry. Did it tend to interfere with the public safety and the welfare of the people of Kansas to permit Dorchy to induce a strike in the mine of the Mackie Fuel Company in order to help Mishmash to collect his disputed claim? The jury (Rec. 29) found that Dorchy was guilty of a misdemeanor in that he did willfully hinder, delay, limit and suspend the operation of the coal mine of the Mackie Fuel Company, as charged in the information.

In the case of *Smiley v. Kansas*, supra, it was held that the facts must be taken as found by the jury, and this court can only consider whether the statute, as interpreted to the jury, was in violation of the federal constitution.

This court, in *Interstate Commerce Commission v. Chi. R. I. & P. R. Co.*, 218 U. S. 88, 30 S. Ct. 659, citing the case of *Smiley v. Kansas*, supra, said:

> "We have said several times that we will not listen to a party who complains of a grievance which is not his."

In 19 Ann. Cas. 175 is an exhaustive note upon the same subject.

This court held, in *Dahnke-Walker Milling Company v. Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 108, that a litigant can be heard to question a statute's validity *only when and so far as it is being or is about to be applied to his disadvantage.* (Citing cases.) This doctrine is also approved in *Rindge Co. v. Los Angeles County*, 43 S. Ct. 689, 693.

In point V of the brief for plaintiff in error reference is made to various features of the statute which are not presented for determination by the conviction of plaintiff in error.

He was convicted for a violation of a portion of the statute set out in section 17 and in section 6. The statement in section 18, "any person willfully violating the provisions of this act," relates back in this case to the specific provisions in section 17 defining the

offense on which the information was drawn and on which he was convicted, and the nature of the offense is specifically set out in section 17 and in section 6. It makes no difference what might happen if an attempt should be made to prosecute under some other part of the statute than the portions in question. That did not affect the rights of Mr. Dorchy in this case.

This prosecution is not based upon any finding of the Court of Industrial Relations. The provision in section 7 referred to in our opponent's brief is not before the court.

The provisions in sections 8 and 9, referring to "such terms, conditions, rules, practices, wages or standard of wages," are not at issue under the information in this case; neither are the provisions in section 13, concerning the time in which an action should be brought to vacate any order made by the Court of Industrial Relations.

What might happen under other states of facts and a prosecution, if any should be brought on account of an act to "delay, limit or suspend the production of a mine," based upon sections 15 and 16 in connection with section 17, is not presented under the information in this case.

Section 3 includes within the act specifically the industry of "mining or production of any substance or material in common use as fuel, either for domestic, manufacturing or transportation purposes." Under section 28 of the act, this provision is operative even though the business of coal mining be not "affected with the public interest." There is no question here presented concerning the transportation of food products and articles entering into wearing apparel, or the transportation of fuel, and whether or not the provisions on those points in subdivision 4 of section 3 is specific is of no consequence in this case.

A similar remark is proper with reference to a refusal to obey a subpœna issued by the Court of Industrial Relations, under section 5 of the act. No such issue is before the court. It is to be noted that under section 11, if anybody should fail to obey a subpœna, the Court of Industrial Relations is authorized to take proceedings in a court of competent jurisdiction to compel obedience. The act does not give authority to the Court of Industrial Relations to compel such obedience.

This court will not consider these contentions, because they are not presented under the information and the evidence.

Tiernan et al. v. Selim Rinker as County Treasurer, (Texas, 1880) 102 U. S. 123, 26 L. Ed. 103.

S. H. H. Clark et al. v. City of Kansas City, Kansas, et al., (59 Kan. 427, 1900) 176 U. S. 114, 44 L. Ed. 392.

Collins v. the State of Texas, (1912) 223 U. S. 288, 56 L. Ed. 439.

Railroad Company v. the Jackson Vinegar Company, (Miss. 1912) 226 U. S. 217, 57 L. Ed. 193.

Darnell v. Indiana, (1912) 226 U. S. 390, 57 L. Ed. 267.

Jeffery Manufacturing Company v. Blagg, (Ohio) 235 U. S. 571, 59 L. Ed. 365.

L. N. Railroad Co. v. the Railroad Commissioners of Kentucky, (1914) 235 U. S. 601, 59 L. Ed. 375.

Dahnke Walker Milling Co. v. Bondurant, (1921 Ky.) 257 U. S. 282, 66 L. Ed. 239.

Dorchy can be heard to object to the constitutionality of this statute only in so far as it affects his right as an individual to induce a strike in a mine in which he is not employed, and for the purpose of collecting, without resort to the courts, of the disputed claim of Mishmash, an ex-employee.

III.

The Public Interest in Mining of Coal in Kansas.

The contention is made in brief of plaintiff in error that the business of coal mining is not clothed with a public interest and that therefore section 3 of the Kansas Industrial Court act violates the

liberty of contract and due process clause of the fourteenth amendment. Reference is made, and part of the opinion of this court in the Wolff Packing Company case, 43 S. Ct. 630, is quoted in support of the doctrine that there can be no public interest in the mining of coal. This court, in the Wolff Packing Company case, was not considering the business of mining coal. That case related to the manufacture of food in a packing plant in Kansas. Even the part of the opinion that is quoted in the brief of plaintiff in error does not hold that there is no public interest in the business of the mining operator or the miner. It only says that it has never been supposed since the adoption of the constitution that such business, with others, "was clothed with such a public interest that the *price of his product or his wages could be fixed by state regulation.*"

This court in that case divided businesses clothed with a public interest into three classes. Evidently the business of mining coal is not included in the first class, which includes only public utilities. Neither is that business included in the second class, in which the public interest is recognized to have attached from the earliest times and survived the period of arbitrary laws for the regulation of trades and callings. In this class are keepers of inns, cabs and grist mills. In the third class are those businesses which, though not public at their inception may be said to have risen to such and have become subject in consequence to government regulation.

This court did not decide that the preparation of food, which was the subject involved in the Wolff Packing Company case, was not in the third class, for it uses this language:

> "We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi-public businesses noted above, because even so, the valid regulation to which it might be subjected as such could not include what this act attempts."

Later in the opinion this court says that the classification of the business of the Wolff Packing Company as public is at the best doubtful.

While the business of the Wolff Packing Company in the manufacture of meat products may not be clothed with a public interest so that the wages of the employees of the company can be fixed by order of the Industrial Court, yet that does not determine that the business of mining coal in Kansas is not clothed with a public interest to such an extent that the state may not prohibit the inducing of a strike in that industry. No order of the Industrial Court is involved in this case. No question of the fixing of wages or hours of labor is involved herein. No question of the deprivation of property or the liberty of contract is involved in this case. Dorchy was not an employee or ex-employee of the Mackie Fuel Company. He had no contract with that company and no relation with it whatever. This strike was not induced to secure higher wages, better working conditions, or shorter hours of labor. Mishmash, in whose interest the strike was induced, was an ex-employee of the Mackie Fuel Company, with which he had a dispute about a claim for additional wages. The question was when he became nineteen years of age. The company began paying him the rate of wages for adult workers on April 1, 1918, viz., $5 per day. He was entitled, under the wage scale, to $3.60 per day until he became nineteen years of age. The company paid him $3.60 per day from August 31, 1917, when he claimed he became nineteen, until April 1, 1918. The amount in dispute was about $180. Instead of going into court and establishing his age at what he claimed it to be, he took the controversy to his labor union and it was dealt with there as set out in the statement of facts. The employees of the Mackie Fuel Company who went out on a strike in order to help Mishmash to collect his claim had no dispute with their employer. The only person who

had a dispute was Mishmash, and he was an ex-employee at the time Dorchy induced the employees of the company to strike.

We contend that there was such a public interest in the mining of coal in Kansas in 1921, that the state could make it a crime for Dorchy to induce a strike in a coal mine in Kansas to willfully hinder, delay and suspend the operation of the mining of coal in that state. Because the business of mining coal may not have been affected with a public interest two or three hundred years ago does not determine that it may not be affected with a public interest to-day. Conditions have changed, and this court has recognized these changes. Since the decision in the Wolff Packing Company case the Supreme Court of Kansas, construing the opinion and mandate, as it had a right to do, has held that that part of the order of the Industrial Court which related to hours of labor and working conditions was not reversed by the decision of this court, and the same was put into force and effect. A second appeal has been taken in that case, and it will be for this court to determine whether the action of the Supreme Court of Kansas was legal. So we contend and insist that the decision of this court in the Wolff Packing Company case cannot be considered a precedent for this case, in which the facts are very different.

The business of mining coal is of such public interest that congress created a coal commission to investigate the subject, and in its first report, January 15, 1923, Sixty-seventh Congress, 4th Session, House Document No. 533, that commission says:

> "The coal problem begins with a contradiction. Rich beyond all other nations in its wealth of coal resources, the United States experiences coal shortages and high prices. The coal deposits of the country are abundant and well distributed. Coal of every variety from anthracite to lignite underlies the hills and plains and mountains in beds whose content is measured by thousands of billions of tons, so that coal of a quality and

in quantity that would be regarded as important by most other nations is found in all but 13 states of the Union, and commercial mines are being operated in 29 states.

"Yet, with resources of coal in the ground adequate for the needs of perhaps a hundred generations of Americans, the nation's coal bin is too often depleted and too often the prices paid for coal are much higher than seem warranted by the wealth of coal available.

"There have been during the last six years three periods when shortage in the supply of coal has given rise to acute national concern. These recurring periods of scarcity have increased the cost of this basic commodity—increases especially serious to domestic consumers, railroads, and public utilities. These experiences of unsatisfied demand and unsatisfactory prices have created in the popular mind a conviction that the natural benefits to be expected from a condition of plenty have been denied through artificial interference. The coal industry, therefore, has been subjected to outspoken criticism, and public dissatisfaction has expressed itself in a series of investigations and in regulatory laws.

"The act creating the United States Coal Commission is an expression of this feeling of public concern and dissatisfaction."

Later, in the same report, the commission says:

"The commission believes that the public interest in coal raises fundamental questions of the relation of this industry to the nation and of the degree to which private right must yield to public welfare. It may be that both private property in an exhaustible resource and labor in a public-service industry must submit to certain modifications of their private rights, receiving in return certain guaranties and privileges not accorded to purely private business or persons in private employ."

In its final report of July 5, 1923, the commission says:

"Coal is quite as much a public necessity as gas, street-railway service, or any other service or commodity that has been brought under public regulation. There should be no secrets from the public in regard to mining costs, profits, salaries, wages, or corporate relations. Banks and insurance companies are privately managed because we find by experience that they

can be managed more efficiently and economically on the principle of individual responsibility. But, like railroads, they are required to report to a public authority and they are subject to such regulation in the public interest as experience may show to be necessary and public opinion may from time to time approve. The guiding principle in such enterprises is no longer maximum profit to owners but maximum service to the public.

"The time has certainly come to establish the same controlling idea in the anthracite coal industry. There is not as yet a sufficient basis in knowledge or experience to determine what form of control or regulation will ultimately be most advantageous. What is clear is that in the operation of coal mines, as in the operation of railroads, telephones, water companies, or banks, the public interest must be respected and served, and that this requirement places limitations on the rights of owners of coal lands, operators, mine workers, carriers, and dealers. The commission believes that the principle of individual and corporate responsibility should be maintained as most likely to insure economical and efficient management of the industry, and that the public interest may be adequately safeguarded by the creation of a governmental authority with power to require financial and operating reports, to prescribe uniform methods of cost accounting, and to determine the conditions on which coal may be shipped in interstate commerce.

. . . . . .

"If, as the commission believes, the mining of coal is clothed with a public interest, then both sides must—peaceably and voluntarily if they will, and under compulsion if they will not—deal with each other in the light of the general welfare of the American people; and while the commission believes there is ample authority to punish a conspiracy of either operators or miners, or both, directed against the general welfare of the people, if there be not such legal authority, it will be recommended for enactment, in the commission's final report."

President Coolidge, in his annual message to congress, uses this significant language:

"The supply of coal must be constant. In case of its prospective interruption, the President should have authority to

appoint a commission empowered to deal with whatever emergency situation might arise, to aid conciliation and voluntary arbitration, to adjust any existing or threatened controversy between the employer and the employee when collective bargaining fails, and by controlling distribution to prevent profiteering in this vital necessity. This legislation is exceedingly urgent, and essential to the exercise of national authority for the protection of the people. Those who undertake the responsibility of management or employment in this industry do so with the full knowledge that the public interest is paramount, and that to fail through any motive of selfishness in its service is such a betrayal of duty as warrants uncompromising action by the government."

Reference to these reports is made in order to show the public interest in the business of the mining of coal at the present time. This public interest existed in Kansas in 1919 before the passage of the Industrial Court act, as is shown by the proclamations of Governor Allen, and his message to the legislature.

These proceedings show the public interest in Kansas in the mining of coal. A special session of the legislature was called by the governor, and the Industrial Court act was passed in order to insure the public safety in the state, and provide the people of the state with fuel.

Conceding, but not admitting, that the public interest in the mining of coal is not so great as to permit the state to fix the wages of miners or the price at which coal may be sold to consumers, yet it certainly has such a public interest that it may insure the public safety and see that coal is furnished to the people of the state.

The legislature of Kansas has declared the mining of coal to be affected with a public interest, and the Supreme Court of the state has approved the validity of this statute. This is conclusive and binding on this court, unless section 17 is clearly arbitrary, unreasonable and has no relation to the purpose of the act.

This court held, in *Jones v. City of Portland*, 245 U. S. 217, 38 S. Ct. 112, that an act of the legislature of Maine, permitting a city or town to establish and maintain within its limits a permanent wood, coal and fuel yard for the purpose of selling at cost wood, coal and fuel to its inhabitants, and giving authority to the city of Portland to levy a tax to pay the expenses of the establishment of such a yard, was not unconstitutional. This court said:

> "The attitude of this court towards state legislation purporting to be passed in the public interest, and so declared to be by the decision of the court of last resort of the state passing the act, has often been declared. While the ultimate authority to determine the validity of legislation under the fourteenth amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information. In that view the judgment of the highest court of the state upon what should be deemed a public use in a particular state is entitled to the highest respect. (*Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 607, 28 S. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008.) In *Union Lime Co. v. Chicago & N. W. Ry. Co.*, 233 U. S. 211, 34 S. Ct. 522, 58 L. Ed. 924, this court declared that a decision of the highest court of the state declaring a use to be public in its nature would be accepted unless clearly not well founded." (Citing cases.)

In the case of *In re Municipal Fuel Plants*, 182 Mass. 605, 66 N. E. 25, the Supreme Court of Massashusetts, in answer to questions submitted by the legislature, held that where it was impossible to secure an adequate supply of fuel through private yards, a municipal fuel yard might be established by the city, for the reason that agencies of government might be able to obtain fuel when citizens generally could not. The court said that it was of the opinion that the government might constitute itself an agent for the relief of the community and that money expended for the purpose would

be expended for the public use. The court answered in the affirmative the question as to whether city or town might be authorized under proper legislation to sell fuel under certain limitations.

In the case of *State v. Barrett*, 172 Ind. 169, 87 N. E. 7, 11, the Supreme Court of Indiana decided that the mining of coal was affected with a public interest, using the following language:

> "It may very properly be said that mining coal is a matter in which the public has a twofold and vital interest; one the production of a highly necessary commodity, and the other the preservation of health, life, and limb. That it is a private enterprise is immaterial. It is also 'affected with the public interests.' 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. For our purposes, we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us, the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void because in excess of the legislative power of the state; but, if it could, we must presume that it did. Of the propriety of legislative interference within the scope of the legislative power, the Legislature is the exclusive judge.' *Munn v. Illinois*, supra."

In the case of *People v. United Mine Workers of America*, 70 Colo. 269, 201 Pac. 54, 56, the Supreme Court of Colorado decided that coal mining was affected with a public interest. The court said:

> "Then, too, a business by circumstance and in its nature may raise from a private to a public concern. *German, etc., Co. v. Kansas*, 233 U. S. 411, 34 S. Ct. 612, 58 L. Ed. 1011, L.R.A. 1915C, 1189, and since the decision of the Morgan case (1889) the rapid development of the relations of the coal miners, the coal operators, and the public have produced a situation very different from that which then existed. Because of these considerations we do not think that the Morgan case controls this one. However, if the statute in question is not constitutional, the dismissal of the bill was right, and must be affirmed.
>
> "Unless coal mining may be said to be affected with a public interest, its regulation by statute to the extent attempted by

said chapter is unconstitutional. See the cases cited below. The words 'affected with a public interest' were no doubt used by the general assembly to keep the statute within constitutional limits. It becomes necessary, then, not only in order to construe the statute, but to decide whether it is constitutional, to determine whether coal mining is so affected, and it seems self-evident that it is. We must take judicial notice of what has taken place in this and other states, and that the coal industry is vitally related not only to all other industries, but to the health and even the life of the people. Food, shelter, and heat, before all others, are the great necessities of life, and, in modern life, heat means coal.

"In 1902 the great anthracite coal strike threatened the social stability of several of the great states, and recently, in the neighboring state of Kansas, under the maxim '*Salus populi lex suprema est*,' the governor seized the coal mines, when a strike had stopped the production of coal, and operated them with volunteers until the emergency had passed. Other instances might be cited. Can it be said that a business with such possible consequences is not affected with a public interest? The answer must be: No." (Citing cases.)

Before the passage of the Kansas Industrial Court act, and in fact one of the principal reasons for its enactment, there were a number of strikes in the Kansas coal fields. At the beginning of winter in 1919 there was an entire cessation in the mining of coal in that part of the state where the principal mines are located. The shortage of coal throughout the state became so general and the public interest in obtaining fuel was so widespread, that the governor issued a proclamation calling for volunteers to dig coal in the mines in the state. He also called out the state militia to protect those who engaged in coal mining. (See appendix A.)

The public also has an interest in the prevention of strikes, especially those in the coal-mining industry. The interest of the public in the prevention of strikes is well stated in the case of *Moore Drop*

Forging Co. v. Fisher, 239 Mass. 434, 132 N. E. 169, 170. In that case the Supreme Court of Massachusetts said:

> "The public has a just interest in the causes of strikes and in placing responsibility and blame for their instigation, prosecution and continuance. The disorder and violence which frequently accompany strikes are matters of common knowledge and often have been adverted to in decisions. (*Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 300; *Nute v. Boston & Maine Railroad*, 214 Mass. 184, 100 N. E. 1099; *Folsom Engraving Co. v. McNeil*, 235 Mass. 269, 278, 126 N. E. 479.) The economic waste and immediate financial loss both to employers and employees arising from strikes are too well known to require discussion. Where a strike exists involving more than twenty-five employees, the public concern in the matter is sufficient to justify an impartial investigation by an unbiased board of public officers within the bounds set forth in the statute. Legislation such as is here assailed is authorized by the general-welfare clause of chapter 1, section 1, article 4, part 2, of our constitution. It has direct connection with the public safety, health and welfare, the recognized foundations for the exercise of the police power. It is within the class of statutes upheld in many cases reviewed in *Holcombe v. Creamer*, 231 Mass. 99, 120 N. E. 354, and is supported by the principle of that decision which need not be here further amplified."

In the case of *State v. Howat*, 109 Kan. 376, 198 Pac. 286, 25 A. L. R. 1210, the Supreme Court of Kansas discussed the question of public interest in the following language:

> "The legislature was of the opinion the industries specified in section 3 of the act of 1920 are affected with a public interest, and so declared. The declaration did not make them so. Whether they are or not depends on their relation to public interest. Without presenting the facts of which the court takes judicial knowledge concerning the peculiar relation the product of the Kansas coal mines bears to the state's fuel supply, and without discussing further the peculiar conditions under which production is accomplished, the court concludes the business of producing coal bears an intimate relation to the public peace,

good order, health and welfare; that such business is affected with a public interest; and that such business may be regulated, to the end that reasonable continuity and efficiency of production may be maintained."

It was out of the legislation of Kansas that the *German Alliance Insurance Company v. Kansas*, 233 U. S. 389, arose for decision in 1914. In that case also some of the most learned counsel in America argued against the validity of the legislative enactment, and a particular contention was (p. 401) that "a general public interest is not equivalent to a public use." It was pointed out in the opinion of this court that—

> "The basic contention is that the business of insurance is a natural right, receiving no privilege from the state, is voluntarily entered into, cannot be compelled, nor can any of its exercises be compelled."

That is the contention of point 1 in the brief for Dorchy, that "the business of mining coal is not clothed with a public interest."

The Supreme Court sustained the act of the Kansas legislature regulating the rates of insurance companies and laid down propositions which are absolutely controlling in the case at bar. This court said (p. 407):

> "The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the state has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business."

"Engaged in a private business" is the test applied in this case. Are mine owners and miners engaged in a private business?

Referring to legislation about the validity of which there had been many pangs and fears, but which had been sustained, this court said (p. 409):

> "Against that conservatism of the mind, which puts to question every new act of regulating legislation and regards the

> legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired."

That states what we contend for here, for while the mining of coal may have been a private business in this country once and not affected by public interest, that has ceased to be so through the development of social, manufacturing and living conditions in this country, and particularly because of the improvement in the facilities of transportation, which have enabled the coal merchant practically to do business from the railway car which he formerly conducted at great cost from a large coal yard stored with fuel. Mining in this country now is done almost directly from pit to furnace. The great coal yards of the large city have disappeared. An unusual storm which delays traffic for two or three days imperils the coal supply of the cities. That is a matter of common knowledge; there is not a winter in which the public does not read in the newspapers of threatened coal famines. This change of conditions has made the coal mine, while still a private property, a property affected with a public interest as much as transportation is.

In a very able discussion of the cases on police power, in *Brown v. Feldman*, 269 Fed. 306, 318, the district court mentioned that "the effort has been to apply a sort of 'rule of reason' to eternally changing facts." Then it added:

> "Having examined the reason for these laws to the best of our ability, we hold it shown that an emergency existed, and that the resultant evil threatened to spread; that the legislative remedy is of a kind long known to the law, though not hitherto used in America; that the business affected is one capable of 'superinducing the right of public regulation'; that the reason

> assignable for such regulation as embodied in the statutes challenged at bar is the kind of reason justifying this kind of statutes, and, it being sufficient in kind, we are not, and as a court cannot be, concerned with its sufficiency in degree."

In the foregoing case it appeared that the welfare of half a million people was concerned, in respect to housing.

In another case, *Gottlieb v. Matckin*, 191 N. Y. S. 777, it was held that the uninterrupted delivery of milk to the people in the state of New York was vital to the general welfare and that any organized effort to interfere with the delivery was an act of hostility to the public weal and called for the exercise of the full authority of the state. Said the court:

> "Whatever may be the right or wrong of the present wage controversy, the welfare of this entire community cannot be made subservient thereto."

The question is, Has coal mining risen, in the language of this court, "from private to be a public concern and be subject, in consequence, to governmental regulation"? That will be answered in the affirmative by a review of the facts. Those facts justify the action of the legislature "for the general welfare" which, as this court said in language before quoted, is "in the first instance a matter of legislative judgment and a judicial review of such judgment is limited."

That is to say, it is for the legislature of Kansas to determine what is required for its own order, peace and safety, and its determination upon the facts will not be judicially reviewed except in limited instances.

In addition to the remarkable recital in the decision of the Supreme Court of Kansas of conditions giving to the people an interest in the operation of the mines attention might be called to the fact of common knowledge that in December, 1917, and January, 1918, the United States Fuel Administration, which was established as an aid

to carrying on the war, took steps toward the reduction of the consumption of fuel, and finally prohibited the heating of any business or professional offices on Mondays from January 21 to March 25, inclusive, which were commonly called heatless Mondays. Under that order great office buildings in the cities and great manufacturing establishments were closed. This need of conservation of fuel was due in part to conditions such as existed in Kansas when the legislation in question was enacted. In 1917 and 1918, as the Supreme Court of Kansas has said, the fate of the man who had gone overseas depended on "patching up strikes at home," there having been between April, 1917, and November, 1918, more than 6,000 strikes in the United States.

Point one of the brief for plaintiff in error is that coal mining is not clothed with a public interest. The foregoing citations, and particularly the recital of facts contained in the decisions of the Supreme Court of Kansas, show unmistakably that it is so clothed.

In opposition to this contention counsel for Dorchy go back into early times, considering the rapid development of industrial and social conditions in this country during the last two decades. They cite *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, decided thirty years ago by the Supreme Court of Missouri, holding invalid a statute requiring employers engaged in "manufacturing or mining" to pay employees in lawful money rather than in any of several kinds of paper mentioned. The act was held invalid because manufacturing and mining employers were affected and others were not, one of the judges dissenting at length.

Of course that decision is of no value in this court, and it has probably by this time been repudiated in Missouri. A similar point was disposed of in *Holden v. Hardy*, 169 U. S. 366, where employers in mines and smelters were forbidden to keep men at work longer

than eight hours a day. In 1908 it was held that the law of Oregon making a distinction between men and women and limiting the day of the latter to ten hours was a valid classification.

Muller v. Oregon, 208 U. S. 412.

A Massachusetts law limiting the length of a day for women in factories was upheld.

Riley v. Commonwealth, 232 U. S. 671.

The particular question raised in the Missouri case was disposed of by the Supreme Court under a law of New York requiring the employer to make semi-monthly payments of wages in cash.

Erie v. Williams, 233 U. S. 685.

The distinction or classification was upheld in *Dominion Hotel v. Arizona*, 249 U. S. 265, where the law limited the length of the day of women in hotels, but permitted their employment for a longer day in railway hotels in order to serve the traveling public.

Indeed, so many cases have been decided that the legislatures may make such classifications as seem necessary, that no more need be cited.

The next case for Dorchy under point one is thirty-seven years old, *Millett v. The People*, 117 Ill. 294, holding that the legislature could not single out owners of coal mines and make them bear burdens not borne by other employers of labor. The provision of the law that all contracts for the mining of coal otherwise than specified in the law should be null was held to violate the liberty clause of the constitution. Of course, as before remarked, that is not the law in this court.

However, the court distinctly held that where the operator and the miner contracted for mining by weight there was "no objection to the statute as imposing upon him the duty of procuring scales for that purpose." The fault with the legislation was that the constitution of Illinois authorized legislation only for the *safety* of the

miner. The constitution authorizing legislation for that purpose, the legislature could not legislate beyond these specifications.

The next case in the brief for Dorchy is *State v. Goodwill*, 33 W. Va. 179; 10 S. E. 285, dating back thirty-four years. That case also turns on the alleged denial of equal protection and holds that the legislature may not single out owners of mines and manufacturers and prohibit them from paying labor in paper.

As remarked before, that case is of no value in this court.

The next case cited for Dorchy is thirty-seven years old, *Godcharles v. Wigeman*, 113 Pa. 437, 6 Atl. 354, holding invalid a law requiring the payment of laborers in iron mills and the like at stated intervals and in money, was unconstitutional as interfering with the right to contract. That case cannot be accepted as law in this court, where such regulations of states have been repeatedly sustained.

To say that the mining of coal in Kansas is not affected with a public interest is to negative the facts, as shown by the industrial conditions and the history of coal-mining operations in Kansas during recent years.

IV.

No Arbitrary or Unreasonable Discrimination in Industrial Court Act—Classification Valid Under Fourteenth Amendment.

Plaintiff in error has raised the point that sections 17, 18 and 19 of the Kansas act, with regard to a strike in a coal mine, are void as being an arbitrary, unreasonable and unjust discrimination in violation of the due-process clause of the fourteenth amendment. Section 19 has no bearing, as Dorchy was never convicted or sentenced under such section. We therefore eliminate it from our discussion.

The statement is made by plaintiff in error at page 16 of the brief, that—

> "The act denies to employees in the mining industry and the officers of their organizations, rights which it does not deny to others similarly situated."

He also cites the cases of *Connelly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679; *McFarland v. American Sugar Refining Co.*, 241 U. S. 79; *Coppage v. Kansas*, 236 U. S. 1; *Allgeyer v. Louisiana*, 165 U. S. 578. These cases have no bearing here, for, either as in the Connelly case they deal with a specified exclusion of certain industries, or else as in the Coppage case deal with the right of contract, which obviously is not here involved. Plaintiff in error can complain of neither of these points. He was convicted of a misdemeanor. He had his day in court. He was found guilty by a jury of having willfully hindered, delayed, limited and suspended the operation of Coal Mine H of the Mackie Fuel Company (Rec. 29). Sections 6 and 17 of the act bear directly upon this point. They show that instead of the act "denying to employees in the mining industry and to the officers of their organizations rights which it does not deny to others similarly situated," it has a universal application. It applies to anyone, no matter in what industry he may be engaged, who shall willfully attempt to hinder, delay, limit, or suspend the operation of certain essential industries. The law makes no distinction in the class of persons, organizations or corporations to whom it might be applied. It might as well have been a lawyer, doctor or a merchant who was charged. He would have suffered the same penalty, had a jury found him guilty, as it did the plaintiff in error.

It is difficult to see how the universality of the statute can be questioned, when it expressly says "it shall be unlawful for *any* person, firm or corporation." It exempts from its penalties no one.

A case largely relied upon in the opposing brief is *Connelly v. Union Sewer Pipe*, 184 U. S. 540, in which the antitrust statute of Illinois of 1893 was held illegal forbidding restrictions in trade, limiting production, increasing prices or preventing manufacture, but excepting from the provisions of the act "agricultural products or live stock while in the hands of the producer or raiser." Of course that involved a very arbitrary and preferential classification and excluded from the operation of the law practically all of the foodstuffs of the country while in the hands of those who produced them.

The holding in that case does not show that the legislature of Kansas made an arbitrary classification when, in view of the circumstances which attended the mining of coal, as we find them recited in the opinion of the Supreme Court of that state, it undertook to keep open coal production. Manufactories of some kinds might be shut down, and often are, for a long time, without inconveniencing the public as a whole, and therefore a decision putting the production of coal in a class by itself was not arbitrary and was not violative of the equal-protection clause.

Another case relied upon in point II is *McFarland v. American Sugar*, 241 U. S. 79, in which an act of Louisiana was held invalid because it undertook to declare an individual presumptively guilty of a crime. The act created a presumption that any person systematically paying a lower price for sugar in that state than he paid in any other state was a party to a conspiracy in restriction of trade. The inaptness of the case is so plain that there is no room for discussion.

As was stated in *Hays v. Missouri*, 128 U. S. 68, 7 S. Ct. 350, 30 L. Ed. 578, the fourteenth amendment "merely requires that all persons subject to such legislation shall be treated alike under the cir-

cumstances and conditions, both in privileges conferred and in liabilities imposed."

See, also, *Barbier v. Connolly*, 113 U. S. 27, 32, 5 S. Ct. 357, 360, 28 L. Ed. 923.

Plaintiff in error is raising almost the identical points raised in the case of *Rosenthal v. New York*, 226 U. S. 260, 33 S. Ct. 27, 30. In that case the state of New York made it a crime for any person, "who being a dealer in or collector of junk, metal or secondhand materials, or the agent, employee or representative of such dealer or collector, buys or receives any wire, cable, copper, lead, solder, iron or brass, used or *belonging to a railroad, telephone, telegraph, gas, or electric light company*, without ascertaining by diligent inquiry that the person selling or delivering the same has a right to do so." This objection was met by this court in the following language:

> "The failure of the legislature to extend the protection of the act to the like kinds of property when owned by manufacturers of equipment for railroads, telephone, and telegraph lines, as well as when owned by the companies operating such lines; or the failure to include the owners of blast furnaces and brass foundries, or other classes who, as claimed by counsel, are liable to losses by theft of articles of the like kinds, affords no footing for an attack by plaintiff in error upon the constitutionality of the act, for the reason that he does not bring himself within any of the classes that, according to the argument, are peculiarly susceptible to losses of the kind that the statute is designed to prevent, nor does he show that he has suffered any injury by reason of the failure of the legislature to extend the protection of the act to other classes of owners." (Citing cases.)

Plaintiff in error may therefore not raise the objection "that farmers, live-stock raisers, wholesalers and retailers of food, fuel and clothing products, and employees in said lines," are excluded

from the application of the act. He may only complain in so far as it relates to the mining industry.

It has been stated by this court in *International Harvester Co. v. Mo.*, 234 U. S. 199, 34 S. Ct. 859, 862, that "a classification is not invalid because of simple inequality"; and in the case of *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 S. Ct. 612, 621, a legislative classification may rest upon narrow distinctions; and again in *Dominion Hotel Co. v. Arizona*, 249 U. S. 265, 39 S. Ct. 273, that the equal protection of the laws does not mean that all organizations that are called by the same name must be treated in the same way, but that the power of the state may be determined by degrees of evil or exercised in cases where detriment is specially experienced. It follows that the language of the act (section 1), "the mining or production of any substance or material in common use, as fuel, either for domestic, manufacturing or transportation purposes," is a sufficiently broad classification and is sufficiently inclusive as to the mining industry to be valid in all respects under the fourteenth amendment.

It was stated by Mr. Justice Brandeis in a dissenting opinion in *Truax v. Corrigan*, 257 U. S. 312, 42 S. Ct. 124, 135:

> "If such changes are made by the acts of the legislature, we call the modification an exercise of the police power. And, although the change may involve interference with existing liberty and property of individuals, the statute will not be declared a violation of the due-process clause unless the court finds that the interference is arbitrary or unreasonable, or that, considered as a means, the measure has no real or substantial relation of cause to a permissible end."

The only remaining test, therefore, is whether or not the inclusion of the mining industry in the manner just specified is either arbitrary or unreasonable. The determination of this must necessarily be dependent more or less upon the problem which the legislature is

called upon to face. The legislature of a state must not be unnecessarily restricted in meeting the problems which confront it. The increasing industrial activity of a community and the more complete organization of capital and labor involve changing economic conditions. The citizens of the community must be protected from an invasion of their rights from new sources not anticipated in a simply organized society. That this court has repeatedly recognized this and has granted a latitude to the legislatures of a state to deal with these conditions is shown by its decisions. In *Dominion Hotel Co. v. Arizona*, supra, it was said:

> "The deference due to the judgment of the legislature on the matter has been emphasized again and again. (*Hebe Co. v. Shaw*, 248 U. S. 297, 303, 39 S. Ct. 125, 63 L. Ed. 255.) Of course this is especially true when local conditions may affect the answer, conditions that the legislature does, but that we cannot, know."

Again, in *International Harvester Co. v. Missouri*, supra, classification must "be accommodated to the problems of legislation."

In *Ozan Lumber Co. v. Union National Bank*, 207 U. S. 251, 52 L. Ed. 195, 28 S. Ct. 89, the court said:

> "It may depend upon the evil without being arbitrary or unreasonable."

Nor can an act be declared unconstitutional by reason of the fact that the legislature of a state has committed some error of judgment. In *Metropolis Theater Co. v. Chicago*, 228 U. S. 361, 33 S. Ct. 441, the court said:

> "To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not

subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void under the fourteenth amendment."

In *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 S. Ct. 66, involving a statute punishing the selling of goods at a lower rate in one place than in another for the purpose of destroying the competition of any regularly established dealer therein or to prevent competition of any person who in good faith intends and attempts to become such dealer, Mr. Justice Holmes, speaking for the court, said:

"The subject matter, like the rest of the criminal law, is under the control of the legislature of South Dakota, by virtue of its general powers, unless the statute conflicts, as alleged, with the constitution of the United States. . . . If the legislature shares the now prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

Further, Justice Brewer, speaking for the court in the case of *A. T. & S. F. Ry. Co. v. Matthews*, 174 U. S. 96, 106, 19 S. Ct. 609, said:

"The very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality. Therefore, it may be there is restraint of competition in a combination of purchasers, but that does not demonstrate that legislation which does not include either combination is illegal. Whether it would have been better policy to have made such comprehensive classification it is not our province to decide. In other words, whether a combination of wage earners or purchasers of commodities called for repression by law under the conditions in the state was for the legislature of the state to determine."

Certainly the classification is not as narrow as that which was sustained in the case of *German Alliance Ins. Co. v. Lewis*, supra, where farmers' mutual insurance companies organized and doing business under the laws of the state, and insuring only farm property, were exempted from a scheme for regulating fire insurance rates; or in *Carroll v. Greenwich*, infra, where fire insurance companies were expressly separated from other insurance companies; or in *Missouri, Kansas & Texas Railway Co. v. Cade*, 233 U. S. 642, 58 L. Ed. 34 S. Ct. 678, where the law permitted attorneys' fees to successful plaintiffs only, and not to successful defendants; or in *Rosenthal v. New York*, supra, where junk dealers were placed in a class distinct from other businesses and regulated with reference to buying or receiving certain materials used or belonging to a railroad, telephone, gas or light company, etc.; or in *Murphy v. California*, 225 U. S. 623, 56 L. Ed. 1229, 32 S. Ct. 697, whereby general billiard and pool halls were prohibited, but permitted in hotels for the benefit of the guests; or in *Fifth Avenue Coach Co. v. New York*, 221 U. S. 467, 31 S. Ct. 709, where advertising trucks and vans or wagons were prohibited, while ordinary business wagons were permitted to display business notices; or in *Quong Wing v. Kirkendall*, 32 S. Ct. 192, 193, where discrimination was made between hand laundries and steam laundries.

The classification in this act is as old as government itself. The necessity of fuel in order to preserve life does not admit of argument. History discloses that the lack of warmth and other necessities has often changed orderly communities into mobs seeking to gain by force those things which the government has not provided for them through the ordinary channels of commerce. It is not an arbitrary classification for the legislature of the state to recognize these facts and secure fuel for its inhabitants and prevent the re-

currence in this industry of the disturbance of the peace and security of the state.

In *Carroll v. Greenwich Ins. Co.*, regulating fire insurance companies, in 199 U. S. 404, 26 S. Ct. 66, the court said:

> "If an evil is specially experienced in a particular branch of business, the constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms. And, 'If the legislature of the State of Iowa deems it desirable artificially to prevent, so far as it can, the substitution of combination for competition, this court cannot say that fire insurance may not present so conspicuous an example of what that legislature thinks an evil as to justify special treatment.'"

And in *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 S. Ct. 612, 620, where certain mutual insurance companies were exempted from the provisions of the act:

> "What makes for the general welfare is necessarily in the first instance a matter of legislative judgment, and a judicial review of such judgment is limited. 'The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

Whereas equal protection of the laws is a pledge of the protection of equal laws, so the legislature must be the guarantor of adequate law in affording equal protection.

And if, as was said in *Pettibone v. Pettibone*, 148 U. S. 197, 13 Sup. Ct. 542, a state can declare a thing unlawful if necessary for protection, it is difficult for us to see how the law can be held to be arbitrary which protects the state and its inhabitants.

This law was passed in order to protect the same rights of life, liberty and property of its citizens that the plaintiff in error now claims are infringed in his case. Upon the state and the government rests the obligation to create the even balance between individuals and business and commerce and labor, upon which the smooth interrelation of our modern complex society depends. Upon the courts devolve the duty to maintain. The employer has rights of liberty, property and contract; the laborer has those same rights; and still further the general public, has likewise the same. The people, "to insure our full rights as American citizens" (preamble, constitution of the state of Kansas), have placed in the legislature the power, and with it the responsibility, to pass such laws and to lay down such rules of action as will preserve that balance, that peace and harmony which are necessary to stable government, and to prevent the excesses and abuse of liberty by some at the expense and deprivation of the rights and liberties of others. With that responsibility upon them, how is the law before us arbitrary or its classification unreasonable? People were freezing, the supply of fuel had ceased, the industry was tied up by illegal strikes, the mines had been taken over by the state, the troops had been called out, volunteers had come from the colleges and business life of the state to go into the mines and dig coal in order to supply the needs of the freezing public—and how, except by law, could a recurrence of such a situation be prevented?

It seems plain to the defendant in error that the state of facts such as was here presented to the legislature—facts which were known throughout every state in the Union—are more than sufficient to sustain the act. It can hardly be said to be an improper use of the power to assume that experience has taught that a situation, having happened in the past, may likewise again happen in the future, unless a remedy is applied. It is sufficient in itself to justify the legis-

lature in having sought and applied the remedy, and the results in this state have more than justified its wisdom.

V.

A Statute Which Makes a Crime An Act, Which Was Previously Illegal Under Judicial Decisions, Is Not Arbitrary or Unreasonable.

Independent of the Kansas Industrial Court act, and under numerous judicial decisions, this was an illegal strike. Dorchy, who induced it, caused the employees of the Mackie Fuel Company, who had no dispute with their employer, to do an illegal act. This being true, a statute which makes it a crime is not so arbitrary or unreasonable as to justify this court in holding it beyond the police power of the state to enact.

It has been repeatedly decided by this court that the state has an interest in the working conditions and hours of labor in mills, manufacturing establishments and dangerous industries. It has been held by this court that the government and state may enjoin strikes after they have been called, when dangerous to the public welfare and a disturbance of the public peace. The power of the government to prevent such strikes has been recognized in *In re Debs*, 158 U. S. 564, 15 S. Ct. 900; *United States v. Railway Employees Dept. A. F. L.*, 283 Fed. 479, 286 Fed. 228 (shop crafts' strike, 1922).

That states have the power to prevent strikes which interfere with the public safety, the public welfare and the public peace of the community, must be conceded. This identical strike in the mine of the Mackie Fuel Company was the subject of the controversy in *State v. Howat*, 109 Kan. 376, 198 Pac. 286, 25 A. L. R. 1210. The Supreme Court of Kansas discussed the question as to whether the

injunction was invalid as an attempt to enjoin a crime. The court said:

> "The purpose of the injunction was not to enjoin crime, and bore no other relation to administration of the criminal law. The purpose was to prevent the irreparable injury which the petition for injunction alleged would occur, and which the court found would occur, unless the defendants were restrained from executing their designs. It might be the defendants would incur sentences to the penitentiary or to jail, but the imposition of those penalties would not fulfill the obligation of the state of Kansas to protect its people from the calamitous consequences of the defendants' wrongdoing, and for which there was no redress. The court found that all the perils to the public welfare which accompanied the coal strike of the winter of 1919-'20 would again be incurred. That strike caused industry to stop, caused commerce to be demoralized, caused food supplies to be reduced and cut off, caused schools to close, caused suffering in homes, and if the defendants had been permitted to have their way, would have caused the sick to languish and die in unwarmed hospital beds in the dead of winter. If those consequences were produced in a single village by blocking the highway over which necessaries of life were brought in, anybody would say blocking the highway was a public nuisance, and a court of equity could open the road. Multiplicity and magnitude of threatened disaster do not detract from authority of a court of equity over the few determined individuals who propose to wreak the disaster. Ability of the defendants to paralyze the normal activities of a whole commonwealth did not free them from amenability to injunction. The district court was warranted in interfering on principles identical with those applied in abatement of public nuisances, and the court was not shorn of power because the defendant, if they persisted, would incidentally be guilty of crime."

The Supreme Court of Kansas sustained the district court in punishing Howat, and this same plaintiff in error, Dorchy, for violating the injunction that it had granted.

The case of *State v. Howat*, 107 Kan. 423, was also decided against the same defendants by that court. Both cases were brought to this

court and decided in the case of *Howat v. Kansas*, 258 U. S. 181, 42 S. Ct. 277. This court found that no constitutional right of these defendants was invaded by what was done by the courts of Kansas. If those courts had a right to enjoin the calling of a strike and possessed the power to punish for contempt the violation of the injunction order, upon what grounds can it be now claimed that the same act which was enjoined there cannot also be made a crime by the Industrial Court act?

The same act may give rise to a civil action and a criminal prosecution. This was decided by this court in the Debs case, *supra*. This court there said:

> "The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution. An assault with intent to kill may be punished criminally, under an indictment therefor, or will support a civil action for damages; and the same is true of all other offenses which cause injury to person or property. In such cases the jurisdiction of the civil court is invoked, not to enforce the criminal law and punish the wrongdoer, but to compensate the injured party for the damages which he or his property has suffered; and it is no defense to the civil action that the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction. So here the acts of the defendants may or may not have been violations of the criminal law. If they were, that matter is for inquiry in other proceedings. The complaint made against them in this is of disobedience to an order of a civil court, made for the protection of property and the security of rights. If any criminal prosecution be brought against them for the criminal offenses alleged in the bill of complaint of derailing and wrecking engines and trains, assaulting and disabling employes of the railroad companies, it will be no defense to such prosecution that they disobeyed the orders of injunction served upon them, and have been punished for such disobedience."

In the case of *State v. Howat*, 109 Kan. 376, supra, section 17 of the Industrial Court act, under which Dorchy was convicted, is discussed by the Supreme Court of Kansas. That court said:

"Section 17 makes unlawful conspiracy to quit employment and to induce others to quit, picketing, and the bludgeoning of those who want to work, whether employees or not, by abuse, intimidation and threat, for the purpose of accomplishing that which the statute was designed to prevent. It is said this section destroys collective bargaining. Collective bargaining is bargaining by an organization or group of workmen, on behalf of its members, with the employer. That privilege is not only protected, but may be exercised, and is expected to be exercised, even to the extent of altering orders of the Court of Industrial Relations. What the defendants contend for is license to conspire to injure the public."

In the case of *State, ex rel., v. Howat*, 109 Kan. 376, 416, where the court held valid, upon general equity powers, an injunction against calling a strike at coal mines under certain circumstances, the validity of the statute was attacked on behalf of Howat, and the court said, referring to the right of the employee to quit his employment:

"It is said the act of 1920 is void because it trenches on personal liberty. The personal liberty contended for is liberty to leave the employer's service. All the leading cases in which the principles involved have been discussed are cited. It is not necessary to review them. The statute expressly guards the privilege of any employee to quit his employment at any time. He may quit before controversy arises, when controversy arises, while controversy is raging, and after controversy has been adjusted. As many others as desire may do likewise, and they may do so as the result of mutual-interest consultations. No employee may, however, transgress the limits of his personal privilege, as defined earlier in this opinion, for the purpose of limiting or suspending production, contrary to the provisions of the act." (p. 416, *id.*)

See, also, the discussion by the court, on pages 405 and 406, *id.*

Carl Mishmash at the time of the strike in question was not an employee of the Mackie Fuel Company. There was no question of raising wages or any dispute as to wages between the members of the union then working at Mine H and the Mackie Fuel Company

The defendant in the case below induced the men working at Mine H to strike, in violation of their contracts of employment, in order to prevent the Fuel Company from a resort to the courts to settle the controversy between it and its ex-employee, Mishmash. The Mackie Fuel Company insisted there had been no arbitration or award made under the terms of any contract. Moreover, it had a constitutional right to resort to the courts to determine three things: (1) whether or not there had been such an arbitration; (2) if there had, then whether or not there was fraud inherent therein which would vitiate it; (3) if there had not, then whether the company's contention or that of its ex-employee was correct. (Secs. 418, 429, G. S. Kan. 1915.) These questions it had a right to submit to a court under the "due process" and "equal protection" clauses of the fourteenth amendment to the constitution of the United States. Dorchy insists here that a statute which, as applied to him, prevented him from coercing the Fuel Company into giving up the protection of the federal constitution, is of itself unconstitutional and void. A statute which makes a crime the commission of that act which has already been declared illegal by judicial decisions cannot be held to be arbitrary or so unreasonable as to violate the federal constitution.

What has been determined by the courts generally as well as by this court to be an illegal strike? A strike is illegal when the means used to accomplish a lawful purpose are unlawful. A strike is illegal when lawful means are used to accomplish an unlawful purpose. In *Pickett v. Walsh*, 106 Mass. 78 N. E. 753, 6 L. R. A., n. s., 1067, the defendants called a strike of the union bricklayers and stonemasons working on two of the three buildings being constructed by L. P. Soule & Son Company, general contractors, because such contractors were employing on a third building, the Ford, pointers who were not members of the bricklayers or stonemasons union.

The pointers sought an injunction against the unions and their walking delegates.

After a discussion of the different phases of strikes and noting that it is illegal for unions to impose a fine on the employer for employing other than union men, or for unions to forbid contractors employing nonunion men, the court said, in regard to the strike against L. P. Soule & Son Company:

> "Such a strike is, in effect, compelling the L. P. Soule & Son Company to join in a boycott on the owner of the Ford building. It is a combination of the union to obtain a decision in their favor by forcing third persons who have no interest in the dispute to force the employer to decide the dispute in their (the defendant unions') favor. Such a strike is not a justifiable interference with the right of the plaintiffs to pursue their calling as they think best. In our opinion organized labor's right of coercion and compulsion is limited to strikes on persons with whom the organization has a trade dispute; or, to put it in another way, we are of opinion that a strike on A, with whom the striker has no trade dispute, to compel A to force B to yield to the striker's demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best."

This conclusion the court supported by a long line of state and federal decisions.

In one of the decisions in the case cited above was *Toledo & A. A. R. Co. v. Pennsylvania Co.*, 54 Fed. 730. There an injunction was sought by the railroad company against Arthur, chief executive of the B. of L. E. and others, to restrain him from issuing and continuing in force an order of said brotherhood which should require the employees of the Pennsylvania company to refuse to deliver cars to or receive cars from complainant's road. The former employees of the defendant road (members of the brotherhood) had struck over a dispute in regard to wages. Under the rules of the B. of L. E., if there was a strike on any road, its members should not handle any cars to or from such road. It was there held that such a boycott

was illegal and a combination or conspiracy for such purpose was one to commit a misdemeanor described by section 10 of the Interstate Commerce act. If any person engaged in such a conspiracy did an act in furtherance thereof, all in such conspiracy were guilty of a criminal conspiracy as denounced by section 5440 Revised Statutes. An injunction was granted against Arthur and others. Subsequently certain of the defendants were punished for contempt in violating the injunction. (*Ibid*, 54 Fed. 746.)

The case of *Thomas v. C. N. N. O. & F. P. Ry. Co.*, 62 Fed. 803, involved a petition by the receiver of that railroad against Phelan and Debs and others to prevent them from impeding the operation of the railroad in his charge by a strike of his employees and of the employees of other railroads in the city of Cincinnati, who were preventing him from receiving and delivering freight and carrying the same on the road in his charge. Such interference was not by reason of any dispute between the receiver and his employees, but by reason of a dispute between the Pullman company and its employees. The defendants were attempting to compel the receiver and others having contract with the Pullman company to discontinue the use of the Pullman cars in violation of their contracts until the Pullman company acceded to the demands of its employees.

In discussing legal and illegal strikes, the court said:

> "Now, what was the combination and its legal character? Was it an unlawful conspiracy? I do not mean by this an indictable conspiracy, because that depends on the statute; but was it a conspiracy at common law? If it was, then injury inflicted would be without legal justification, and malicious."
>
> . . .
>
> "But the combination was unlawful without respect to the contract feature. It was a boycott. The employees of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They had no complaint against the

use of Pullman cars, as cars. They came into no natural relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours, or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury on the companies that was very great, and it was unlawful, because it was without lawful excuse. All the employes had the right to quit their employment, but they had no right to combine to quit in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever on the character or reward of their service." . . .

"The purpose, shortly stated, was to starve the railroad companies and the public into compelling Pullman to do something which they had no lawful right to compel him to do. Certainly the starvation of a nation cannot be a lawful purpose of a combination, and it is utterly immaterial whether the purpose is effected by means usually lawful or otherwise."

In *United Shoe Machinery Corporation v. Fitzgerald, et al.*, 237 Mass. 537, 20 A. L. R. 1508, it was held that a strike to compel an employer to adopt a system of collective bargaining was unlawful.

As to what constitutes legal justification for strike of employees, see notes in 24 Ann. Cas. 1302, 1916C, L. R. A., p. 989.

As to the criminal liability for those engaged in boycotting, see Note, 16 A. L. R., p. 243, 6 A. L. R., p. 979.

On the question of illegality of strikes, see, also, 20 A. L. R. 1513, and 26 A. L. R. 159.

Turning to the decisions of this court in *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, it was held that a combination by members of labor union which had for its purpose the destruction of the business of the complainants unless the complainants unionize their shops, was illegal and violated the Sherman antitrust act, interstate commerce being involved. In other words, the use of strike and boy-

cott to compel others to desist from handling the complainants' products until the complainants granted recognition of the unions was illegal.

In *Hitchman Coal & Coke Company v. Mitchel*, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, an action was brought by a coal company of West Virginia against the officers of an international labor union and others to enjoin them from carrying out a scheme to bring the employees of the company and all the West Virginia mining companies into the international union, so that the union could control, through its members, the production and sale of coal in West Virginia in competition with the mines of Ohio and other states. The company had required, under its various contracts of employment with its nonunion employees, that they should not remain in the complainant's employ if they joined the union. The plan of the international union was to seek to induce such employees to become members of the union, contrary to the contract of employment, to have such employees remain in the company's employ, and after enough of the employees had secretly become members of the union, instantly to declare a strike against complainant, leaving it in a helpless situation so that it would have to consent to be unionized. This court held that the purpose was unlawful, that the means were not lawful, and that the defendants there were engaged in an unlawful conspiracy which was enjoined. In the course of the opinion it was said:

> "Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employees, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment was 'at will,' and terminable by either party at any time, is of no consequence." . . .
>
> "The right of action for persuading an employee to leave his employer is universally recognized—nowhere more clearly than in West Virginia—and it rests upon fundamental principles of

general application, not upon the English statute of laborers." . . .

"The case involves no question of the rights of employees. Defendants have no agency for plaintiff's employees, nor do they assert any disagreement or grievance in their behalf. In fact, there is none; but, if there were, defendants could not, without agency, set up any rights that employees might have. *The right of the latter to strike would not give to defendants the right to instigate a strike.* The difference is fundamental."

In the instant case Dorchy was not an employee of the Fuel Company. As stated above, the right of an employee of the Fuel Company to strike, and the right of Dorchy, an outsider, to instigate a strike, are fundamentally different. The right of the employees of the fuel company to strike would not give to defendant, Dorchy, the right to instigate a strike.

Dorchy can make no claim of agency. The jury acquitted him of the charge of acting as an officer of the union. He was convicted only on the count charging him with instigating a strike in his individual capacity.

In *Plant v. Woods*, 176 Mass. 504, Holmes, chief justice, said, in a dissenting opinion:

"I agree that the conduct of the defendants is actionable unless justified. (*May v. Wood*, 172 Mass. 11, 14, and cases cited.) I agree that the presence or absence of justification may depend upon the object of their conduct; that is, upon the motive with which they acted. (*Vegelahn v. Guntner*, 167 Mass. 92, 105, 106.) I agree, for instance, that if a boycott or a strike is intended to override the jurisdiction of the courts by the action of a private association, it may be illegal. (*Weston v. Barnicoat*, 175 Mass. 454.)"

In the case of *Weston v. Barnicoat*, 175 Mass. 454, 457, 458, 56 N. E. 619, an action for libel, opinion by Holmes, chief justice, it was stated:

"Several rulings were asked on the question of privilege. As we have said, the case is to be considered solely on the footing

of libel. From this point of view it is perfectly plain that the judge could not have ruled that the communication was privileged as matter of law. The jury well might have found facts that would cut at the roots of such a ruling. . . . They might have found that the whole organization was a mere scheme to oust the courts of their jurisdiction, and to enforce colorable claims of the members by a boycott intended to take the place of legal process, and that there was no pretense of any duty about the matter. . . . More specifically, a false statement of a kind manifestly hurtful to a man in his credit and business, and intended to be so, is not privileged because made in obedience to the requirements of a voluntary association got up for the purpose of compelling by a boycott the satisfaction of its members' claims to the exclusion of a resort to the courts."

In the case of *Giblan v. National Amalgamated Laborers Union*, 2 K. B. 600 (1903), persons who caused a master to discharge his servant by threat of a strike, to compel the servant to pay a debt, were held liable to the servant.

It is unlawful to cause the discharge of a servant, by threat of a strike, on account of a controversy over the delivery of a book possessed by the servant.

Cornell v. Stalker, 29 Misc. 423, 45 N. Y. Supp. 1048.

In *Duplex Printing Press Company v. Deering*, 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349, the International Association of Machinists, an unincorporated association having a large membership, united into a combination to compel the complainant to unionize its factory, enforce the closed shop, the eight-hour day and the union schedule of wages by boycotting the interstate trade of that company. They conducted in New York city a campaign of threatening the customers of the printing-press company, the truck companies that carried its presses, and those who were engaged in the work of setting up such presses, with injury to them in their business, if they continued to deal with the Duplex company or its

presses. It was an attempt by coercion to use the right of trade of persons having nothing to do with the controversy between the Duplex company and the machinists' union, and having no interest in it, to injure the Duplex company in its business. This was decided not to be within section 20 of the Clayton act. It was held, following the case of *Loewe v. Lowler*, supra, to be an unlawful combination in restraint of interstate trade and was enjoined. In the Duplex Printing Press case there was no charge that defendants were inducing employees to break their contracts, nor was it urged in this court that defendants threatened acts of violence. In the opinion it was said:

> "To instigate a sympathetic strike in aid of a secondary boycott cannot be deemed 'peaceful and lawful' persuasion. In essence it is a threat to inflict damage upon the immediate employer, between whom and his employees no dispute exists, in order to bring him, against his will, into a concerted plan to inflict damage upon another employer who is in dispute with his employees."

So here, Dorchy, who was not an employee of the Fuel Company, was instigating a strike of the employees of the Fuel Company in order to compel the Fuel Company to settle a dispute between it and a man who was not then an employee of the company, and who did not intend so to become. There was no dispute between the Fuel Company and its employees. The sole purpose of the strike was by intimidation and coercion to prevent the Fuel Company from exercising the rights granted to it under the constitution of the United States and the state of Kansas of resorting to the courts for the determination of a question arising under a contract of employment which had already been terminated. In other words, the strike was for the purpose of ousting the courts of jurisdiction to herein determine the controversy in question. This cannot be done by conclusive arbitration clauses.

Potomac Steamboat Company v. Baker Salvage, 123 U. S. 40, 8 Sup. Ct. 33.

Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & C. R. Co., 139 U. S. 137, 35 L. Ed. 116.

New York Home Ins. Co. v. Morris, 20 Wall. 445, 22 L. Ed. 365.

Richardson v. Emmert, 44 Kan. 262.

5 C. J. 40

Jefferson F. Ins. Co. v. Bierce, 183 Fed. 588.

No more should it be done through strikes.

While it was claimed by the strike order that the matter had been submitted to arbitration, there was no evidence of such arbitration or award offered at the trial of the defendant. On the other hand, the Fuel Company contended that no arbitration had been had. It was clearly an attempt by coercion to compel the Fuel Company to accept an outsider's determination of a disputed question of fact and to prevent resort to courts to determine the question.

We submit that it is not unconstitutional to make a crime the inducing of the breaking of the contracts of employment by employees of the Fuel Company where there was no dispute as to wages between the Fuel Company and the employees. As was said by Mr. Justice Pitney in *Hitchman Coal & Coke Co. v. Mitchel*, supra, the right of the employees to strike does not confer upon a third person the right to instigate a strike. The right of the employees to strike did not confer upon Dorchy, an outsider, the right to instigate a strike. Dorchy was convicted of instigating a strike where there was no dispute between the employees and the company. Even if there had been an arbitration and an award, the Fuel Company could not be prevented from questioning in the courts the existence of such arbitration and award and its fairness and freedom from fraud. (Secs. 418, 429 G. S. Kan. 1915.) Yet the defendant in this case seeks to have declared unconstitutional a statute which

as applied to him, made it a crime for him by coercion and intimidation to prevent the exercise by the Fuel Company of its constitutional right to resort to courts for the interpretation and adjudication of the rights of the respective parties under a simple contract of employment.

Courts never make a contract for parties. The parties must make it for themselves. After it is made, either party has a right to submit it to the courts for interpretation. In this case there was no dispute as to the making of the contract between Mackie Fuel Company and Mishmash. The dispute was as to the facts to which the contract related. The contract was clear that Mishmash was to get $5 per day after he became nineteen. The question was, When did he become nineteen? This was a justiciable controversy which could be submitted to a court by either party. The strike was not for the purpose of fixing the rate which Mishmash was to receive after he became nineteen. It was for the purpose of compelling the Mackie Fuel Company to accept the union's finding instead of a court's finding as to the date when Mishmash became nineteen. A strike is not unlawful when used by employees to secure more favorable terms in the making of a future contract, but it is unlawful when used to compel the acceptance of the union's finding on disputed facts. No court has ever upheld the acts of a party who has compelled another party to a contract, by intimidation, to forego resort to the courts for the determination of a disputed fact under an existing contract. We submit that a statute is not void which makes it a crime to deny through intimidation another's constitutional right to resort to the courts under the circumstances here involved.

To permit Dorchy to suspend the operation of the Mackie Fuel Company mine was to give to Mishmash a special and unlawful weapon in order to collect his disputed claim. The state had pro-

vided courts in which disputed claims could be adjudicated according to law. The cause for calling the strike is clearly set forth in the strike order (Rec. 36). The men employed at the mines of the Mackie Fuel Company were directed and notified to cease work on February 4, 1921, until such time as the company would pay the claim of Mishmash. This claim had not been adjudicated in court, and there was a dispute between Mishmash and the company as to its validity. Under these circumstances the resort to a strike instead of giving the Mackie Fuel Company its day in court is clearly a resort to force instead of to judicial procedure. Dorchy used the influence he had to close the mine until the claim was paid. It was a deliberate step in the direction of intimidating the Mackie Fuel Company to pay an unadjudicated claim. For the state to have permitted this course to be pursued without inflicting punishment on Dorchy would not have afforded due process to the Mackie Fuel Company, but would have compelled it to pay the claim of Mishmash without an adjudication in court.

The Mackie Fuel Company had a right to its day in court to contest the legality of this claim. Could not the state deter Dorchy from inducing this strike when he was not an employee of the company and had no controversy with it, by making it a crime? Would it not be denying to the Mackie Fuel Company the equal protection of the laws under the fourteenth amendment to permit Dorchy to intimidate the company and compel it to pay this unadjudicated claim?

In the case of *Truax v. Corrigan*, 250 U. S. 312, 42 S. Ct. 124, 129, the following pertinent language is used by Chief Justice Taft:

> "This brings us to consider the effect in this case of that provision of the fourteenth amendment which forbids any state to deny to any person the equal protection of the laws. The clause is associated in the amendment with the due-process clause and it is customary to consider them together. It may be that they over-

lap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due-process clause brought down from Magna Charta was found in the early state constitutions and later in the fifth amendment to the federal constitution as a limitation upon the executive, legislative and judicial powers of the federal government, while the equality clause does not appear in the fifth amendment and so does not apply to congressional legislation. The due-process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. (*Hurtado v. California*, 110 U. S. 516, 535, 4 S. Ct. 111, 28 L. Ed. 232.) It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due-process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty."

VI.

The Rule Which Permits Strikes Under Some Circumstances Is One of Economics and Public Policy and Is Not Based on Any Constitutional Provision.

THE OLD RULE ON STRIKES.

In England, both as a result of statutes and of the growth of common-law doctrines, the strike was treated as unlawful. Under the common law, as laid down by the courts, it was illegal.

Rex v. Journeyman Tailors, 8 Mod. Rep. 11.
Springhead Spinning Co. v. Riley, L. R. 6 Eq. 554.

It was held to be in restraint of trade in a case where no statute was referred to.

Hornby v. Close, 2 Q. B. L. R. 153, 158, 169 (1867).

See, also, on the subject, *Rex v. Mawbey*, 60 T. R. 619, 636.
Walsby v. Anley, 3 E. & E. 516, 523.
Quinn v. Leathem, (1901) A. C. 495, 526, 541.
Regina v. Bunn, 12 Cox C. C. 316.

The rule in England has been changed by statutes, and strikes for many purposes are now permitted.

In Pennsylvania a strike was formerly illegal at common law, but now is permitted for some purposes, by statute.

Cote v. Murphy, 159 Pa. St. 420, 425.

In New York strikes were formerly unlawful at common law.

People v. Melvin, 2 Wheeler's Criminal Cases 262.

In the case of *People v. Fisher*, 14 Wend. 9, 13, 20, decided in 1835 by the Supreme Court of Judicature of New York, a combination of journeymen shoemakers was charged to fix a price for making coarse boots, and that if a journeyman shoemaker should make such boots for compensation below the rate established, he should pay a penalty of $10; and if any master shoemaker employed a journeyman who had violated the rules, they would refuse to work for him and would quit his employment; and it was charged that the members of the combination carried it into effect by leaving the employment of a master workman in whose services a journeyman had violated their rules, and thus compelled a master shoemaker to discharge such journeyman from his employ. There was a statute of New York on conspiracy which made it a misdemeanor, among other things, "to commit any act injurious to the public

health, to public morals, or to trade or commerce." The defendants were indicted for conspiracy alleged in violation of this statute. The indictment was sustained. In its opinion the court said that at common law "journeymen may each, singly, refuse to work unless they receive an advance of wages, but if they do so by preconcert or association, they may be punished for a conspiracy." The court held that the combination was injurious to trade within the meaning of the statute. "If the defendants cannot make coarse boots for less than one dollar per pair, let them refuse to do so; but let them not, directly or indirectly, undertake to say that others shall not do the work for a less price. It may be that Pennock, from greater industry or greater skill, made more profit at making boots at seventy-five cents per pair than the defendants at a dollar. He had a right to work for what he pleased. His employer had a right to employ him for such price as they could agree upon. The interference of the defendants was unlawful; its tendency was not only to individual oppression, but to public inconvenience and embarrassment."

THE NEW RULE ON STRIKES.

> "The change in the law by which strikes once illegal and even criminal are now recognized as lawful was effected in America largely without the intervention of legislation. This reversal of a common-law rule was not due to the rejection by the courts of one principle and the adoption in its stead of another, but to a better realization of the facts of industrial life."
>
> Brandeis, J., dissenting opinion, *Duplex Printing Co. v. Deering*, 234 U. S. 443, 481.

In 1867, in a case in the court of common pleas for the city and county of New York, an action was brought by the plaintiff, a corporation composed of master stevedores, of which the defendant was a member. It had a by-law "to the effect that there should be no variation from the prices adopted by the association, and that

(Master Stevedores' Assn. v. Walsh, 2 Daly 1)

if any member, after an investigation by a committee, should be found guilty of working for less than the prices fixed, he should forfeit to the association 25 per cent of the amount of such bill as fixed, which penalty might be collected in the name of the corporation by due process of law." The complaint charged that the by-law was subscribed to by defendant, that the corporation (plaintiff) had fixed the rate for discharging railroad iron from vessels at 52 cents a ton, and that the defendant had discharged 1,500 tons in violation of this rate, that he was consequently found guilty by the association of a violation by working for less than the recognized price, and incurred a penalty of $125, for the recovery of which the action was brought." The court said:

> "It may, therefore, be laid down as the result of this examination, that it is lawful for any number of journeymen or of master workmen to agree, on the one part, that they will not work below certain rates, or, on the other, that they will not pay above certain prices; but that any association or combination for the purpose of compelling journeymen or employers to conform to any rule, regulation or agreement fixing the rate of wages, to which they are not parties, by the imposition of penalties, by agreeing to quit the service of any employer who employs a journeyman below certain rates, unless the journeyman pays the penalty imposed by the combination, or of menaces, threats, or intimidations, violence, or other unlawful means, is a conspiracy for which the parties entering into it may be indicted."

The court said that it would be in the power of the members of the association, by associated effort, to secure what it would not be possible for one of them to accomplish alone, and that the combination was not prejudicial to the interests of the public. It did not argue that the combination would be sustained on any constitutional ground.

The court sustained the validity of the by-law upon a demurrer to the complaint. There was no strike, actual or threatened, in the case.

Afterwards, by statute, strikes for certain purposes were permitted in New York.

In Massachusetts, in 1842, in *Commonwealth v. Hunt*, 4 Mete. 111, the Supreme Judicial Court had before it for consideration an indictment against seven defendants for conspiracy. The first count of the indictment charged a conspiracy *inter alia*, "and, being so assembled, did then and there unjustly and corruptly combine, confederate and agree together, that none of them should thereafter, and that none of them would, work for any master or person whatsoever, in the said art, mystery or occupation, who should employ any workman or journeyman, or other person, in the said art, who was not a member of said club, society or combination, after notice given him to discharge such workman from the employ of such master."

The other counts of the indictment charged that as a result of the conspiracy the defendants caused the discharge of one Jeremiah Horne from his position as a journeyman bootmaker. The defendants having been found guilty on the indictment in the municipal court, the case came before the Supreme Judicial Court, which sustained exceptions to the indictment and arrested the judgment. The court passed upon the question of the validity of the indictment under the criminal law, and did not pass upon the question whether the combination and the acts done under it were protected by any provision of the state or federal constitution. At one point in the opinion it touched upon the question of economics and public policy in these words:

> "We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public-spirited." (p. 134, supra.)

The view of the court on one of the points passed upon in *Commonwealth v. Hunt* has not been followed in Massachusetts. It has been there held that a threat of a strike in order to compel the discharge of a person not a member of the defendants' union, for the purpose of compelling such person to become a member of that union, is unlawful.

Plant v. Woods, 176 Mass. 492.
Aberthaw Construction Co. v. Cameron, 194 Mass. 208.

Some of the states have adopted statutes permitting strikes under some circumstances. Among them are New York, New Jersey and Pennsylvania.

NEW YORK: Sec. 582, art. 54, Penal Law—Conspiracy. McKinney's Consolidated Law of New York, annotated (1917), p. 220. (Sec. 170, Penal Code of 1881, as amended L. 1882, ch. 384, sec. 1.)

NEW JERSEY: Par. 128, sec. 1, p. 3051, vol. 3, Compiled Laws of New Jersey (1911), subhead 9, "Labor Unions," under the head of "Labor." The foregoing statute was the act of Feb. 14, 1883, P. L. of 1883, p. 36, which statute read:

> "That it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise to persuade, advise, or encourage, by peaceable means, any person or persons, to enter into any combination for or against leaving or entering into the employment of any other person, persons or corporation."

The statute as printed in the Compiled Laws of 1911 follows the original statute, except that the word "other" was omitted next preceding the words "person, persons or corporation," at the end of the section.

In the case of *Frank & Dugan v. Herold*, 63 N. J. Eq. 443, 447, 448, Pitney, vice chancellor, said, referring to this statute, "In my judgment the true construction of the act of 1883 is simply that it

renders innocent, as against the public, an act which previous to its passage was a misdemeanor and punishable by indictment. It does not take away or in any wise affect any private rights which may arise out of acts which are legalized by that legislation."

PENNSYLVANIA: Sec. 21244 (1869, May 8, P. L. 1260, Sec. 1); sec. 21245 (1872, June 14, P. L. 1175, sec. 1.); sec. 21246 (1876, Apr. 20, P. L. 45, sec. 1; sec. 21254 (1891, June 16, P. L. 300, sec. 1). Pennsylvania Statutes, Complete to 1920 (1921, published by The West Publishing Co.).

The opinions in *Master Stevedores' Association v. Walsh*, and *Commonwealth v. Hunt, supra*, were the starting points for many cases holding strikes lawful where they are for the purpose of obtaining higher wages for the employees, shorter hours, or better working conditions. This rule, as it has been developed, is one of law, and not of constitutional right. The reason for it is that it enables the workmen, by combination, to obtain better terms from their employer than if they acted singly, and thereby to improve the condition of the workmen. This rule is one of economics and public policy and not of constitutional right.

The reasons are well stated in the case of *Wabash R. Co. v. Hannahan*, 121 Fed. 563, 568. The court said:

> "An employee has an unquestionable right to place a price and impose conditions upon his labor at the outset of his employment, or, unless restrained by contract obligations, upon the continuance of his labor at any time thereafter; and, if the terms and conditions are not complied with by the employer, he has a clear right either not to engage, or having engaged in his service, to cease from work. What one may do all may do.
>
> "They may seek and obtain counsel and advice concerning their rights, duties and obligations in relation to their employer, and persons interested in their welfare may advise, aid and assist them in securing such terms and conditions of service as will best subserve their interests, and what they may lawfully

do singly or together they may organize and combine to accomplish.

"In like manner, as capital is combined for legitimate purposes, so labor may combine for legitimate purposes, but this right of combination, and the resulting right to strike or quit their employment, is a weapon for the defense and protection of employees, and not a weapon of attack. They may, by peaceful and lawful combination and concert of action, be able to so control the supply of labor as to compel the employer to come to their terms, but they are not at liberty to make use of this weapon to otherwise interfere with or injure the employer or co-employee. The clear line of demarkation, recognized by all the authorities, is that the lawful and permissible strike must not be attended by violence to or destruction of property or by other coercive measures intended to prevent the employer from securing other employees or otherwise carrying on his business according to his own judgment."

The foregoing reasons are not on constitutional grounds, but on grounds of economics and public policy.

In other cases the courts have sometimes spoken of the natural right of the individual to work or not as he pleases. The ground of these cases—that is, economics and public policy—is expressed in a few of the decisions, but in others it is not. That ground is clearly stated in the dissenting opinion of Justice Holmes in *Vegelahn v. Guntner*, 167 Mass., at page 167, although that case directly involved picketing, which grew out of a strike.

In his dissenting opinion in the case of *Vegelahn v. Guntner*, supra, he said, at pages 105, 106, 107 and 108, 167 Mass.:

"I agree, whatever may be the law in the case of a single defendant (*Rice v. Albee*, 164 Mass. 88), that when a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose, or the defendants prove, some ground of excuse or justification. And I take it to be settled, and rightly settled, that doing that damage by combined persuasion is actionable.

as well as doing it by falsehood or by force. (*Walker v. Cronin*, 107 Mass. 555; *Morasse v. Brochu*, 151 Mass. 567; *Tasker v. Stanley*, 153 Mass. 148.)

"Nevertheless, in numberless instances the law warrants the intentional infliction of temporal damage because it regards it as justified. It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable anyone even to form an intelligent opinion about them. In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas for which a rational defence is ready."

. . . . . .

"I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethern would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests."

. . . . . .

And in the dissenting opinion of Chief Justice Holmes, in *Plant v. Woods*, he said, at page 505 of 176 Mass.:

"To come directly to the point, the issue is narrowed to a question whether, assuming that some purposes would be a justification, the purpose in this case of the threatened boycotts and strikes was such as to justify the threats. That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable

it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest.

"Although this is not the place for extended economic discussion, and although the law may not always reach ultimate economic conceptions, I think it well to add that I cherish no illusions as to the meaning and effect of strikes. While I think the strike a lawful instrument in the universal struggle of life, I think it pure phantasy to suppose that there is a body of capital of which labor as a whole secures a larger share by that means."

The doctrine that strikes under certain circumstances may be lawful had not long been declared before the necessity was forced upon the courts of limiting the occasions in which strikes might be called or enforced. There have been many such cases, some which we cite:

A strike is illegal for the purpose of redressing a grievance of an individual member of the labor union.

"The strike in question was a combination for the purpose of making the trades council, composed of delegates from the unions of which the individual defendants are members, the arbiter of all questions between individual employees and their employers. It purports to include questions arising under contracts still in existence between the two. To force the employer to submit to a delegate body of employees his rights under an existing contract by a combination for that purpose is not a justifiable interference with their employer's business. . . . We do not mean to say that a labor union can not combine to support a committee to take up individual grievances in behalf of the several members. What we now decide to be illegal is a combination that such grievances (that is to say grievances between an individual member of a union and his employer which are not common to the union members as a class), shall

be decided by the employees and that decision enforced by a strike on the part of all."

Reynolds v. Davis, 198 Mass. 294, 84 N. E. 457, 17 L. R. A., n. s., 162, 170.

"Every man, as I have stated, has a right to leave the service of his employer if he is not satisfied with the wages he gets, but men ought not to combine together and cause at once a strike among all railroad employees, so as to prevent the running of trains, because the injury there is public in its character; it affects the whole country, as it were, and not a particular community or a particular neighborhood, and in several states it is made a public offense."

King v. Ohio & M. Ry. Co., 7 Bissell, 537.

The following have been held to be unlawful:

A combination of third parties to induce employees to quit work in order to obtain higher wages.

Old Dominion Steamship Company v. McKenna, 30 Fed. 48.

A combination of persons to induce employees to break their contract of employment or to quit work.

Employing Printers' Club v. Dr. Blosser Co., 122 Ga. 509; 50 S. E. 353; 69 L. R. A. 90, 95, 96; 106 Am. St. Rep. 137.

A combination to induce employees to break their contract of employment.

Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077; 35 L. R. A. 722; 57 Am. St. Rep. 443.

South Wales Miners' Federation v. Glamorgan Coal Co., 1905 A. C. 239, 244, 255; 2 A. & E. Ann. Cas. 436.

Walker v. Cronan, 107 Mass. 555.

Thacker Coal & Coke Co. v. Burke, 59 W. Va. 253; 53 S. E. 161; 5 L. R. A., n. s., 1091; 8 Ann. Cas. 885.

Thomas v. C. N. O. & T. P., 62 Fed. 803, 818.

A strike to compel workmen to break their contract of employment.

Folsom v. Lewis, 208 Mass. 336; 94 N. E. 316; 35 L. R. A., n. s., 787.

To break their contract for service at will.

Thacker Coal & Coke Co. v. Burke, 59 W. Va. 253; 53 S. E. 161; 5 L. R. A., n. s., 1091; 8 Ann. Cas. 885.

To stop work in violation of a contract of employment.

Mapstrick v. Ramge, 9 Neb. 390; 2 N. W. 739.

Hitchman Coal & Coke Co. v. Mitchell, 212 Fed. 512, 549, 550, 554, 556, 557.

Jones Glass Co. v. Glass Bottle Blowers' Association, 77 N. J. Eq. 219, 221, 223, 224; 41 L. R. A., n. s., 445; 79 Atl. 262.

To maintain a patrol in order to induce persons not to work for a party.

Vegelahn v. Guntner, 167 Mass. 92, 99, 100.

To strike in order to prevent the hauling of cars by one railroad for another.

Waterhouse v. Comer, 55 F. 149, 155, 156.

Toledo, Ann Arbor & North Mich. R. R. v. Penn. Co., 54 Fed. 730, 746.

Lowe v. Lowe, 54 Fed. 746.

To prevent a railroad hauling Pullman cars.

U. S. v. Elliott, 62 Fed. 801.

To compel an employer to abolish piece work.

Davis Machine Co. v. Robinson, 41 Misc. 329; 84 N. Y. Sup. 837, 839, 841.

To compel an employer to cease using machinery.

Hopkins v. Oxley Stave Co., 83 Fed. 912; 28 C. C. A. 99.

To threaten to strike in order to prevent a party furnishing materials to be used in the work.

Burnham v. Dowd, 217 Mass. 351, 356, 357.

To strike to compel an employer not to do work on a building where work was being done by another union which the strikers' union claimed its members should do.

Pickett v. Walsh, 192 Mass. 572; 78 N. E. 753; 6 L. R. A., n. s., 1067; 116 Am. St. Rep. 272.

To strike to compel an employer to hire only union men.

Folsom v. Lewis, 208 Mass. 336; 94 N. E. 316; 35 L. R. A., n. s., 787.

Snow Iron Works v. Chadwick, 227 Mass. 382, 389; 116 N. E. 801; L. R. A. 1917F. 755.

State v. Glidden, 55 Conn. 46; 8 Atl. 890; 3 Am. St. Rep. 23.

Hite Mfg. Co. v. Murphy, 78 N. H. 398, 404, 405; 101 Atl. 357.

Davis Machine Co. v. Robinson, 41 Misc. 329; 84 N. Y. S. 837, 840, 841.

Schwarcz v. International Ladies' G. W. Union, 68 Misc. 528; 124 N. Y. S. 968, 970-973.

O'Brien v. People, 216 Ill. 354, 370-373; 108 Am. St. Rep. 219; 75 N. E. 108; 3 Ann. Cas. 966.

To request customers of a draying company to withdraw their business from it, under penalty of strikes of the union workmen of such customers, in order to compel the draying company to employ only union labor.

Auburn Draying Co. v. Wardell, 227 N. Y. 1; 124 N. E. 97; 6 A. L. R. 901.

To induce an employee to quit his work as organist in a theater in order to compel the employer to employ an orchestra of five to furnish music at the theater in place of the organ.

Haverhill Strand Theatre v. Gillen, 229 Mass. 413; 118 N. E. 671, Am. Cas. 1918D, 650, L. R. A. 1918C, 813.

To strike to compel an employer to hire a particular person.

Commonwealth v. Curren, Pittsburg, p. 143.

To threaten to strike in order to compel an employer to discharge certain employees.

State v. Donaldson, 32 N. J. L. 151; 90 Am. Dec. 649.

To threaten to strike in order to cause the discharge of a non-union workman.

Lucke v. Clothing Cutters & Trimmers Assembly, 77 Md. 396, 402, 407.

Plant v. Woods, 176 Mass. 492, 505; 57 N. E. 1111; 51 L. R. A. 339; 79 Am. St. Rep. 330.

Aberthaw Construction Co. v. Cameron, 199 Mass. 208.

To strike to prevent others from obtaining work.

Erdman v. Mitchell, 207 Pa. 79; 26 Atl. 327; 63 L. R. A. 534; 99 Am. St. Rep. 783.

To strike in order to enforce the will of the strikers as to the method of conducting the business.

Hitchman Coal & Coke Co. v. Mitchell, 212 Fed. 512, 549, 550, 554, 556, 557.

State v. Stewart, 59 Vt. 273; 9 Atl. 559; 59 Am. St. R. 710.

To strike to compel an employer to join a master plumbers' association.

Commonwealth v. Chrystie, 24 Misc. 226; 53 N. Y. Sup. 668.

To induce employees to quit work for the purpose of extorting money from the employer.

State v. Dalton, 134 Mo. App. 517, 535, 538; 114 S. W. 132.

To extort money from an employer as a consideration for permitting strikers to return to work who had made a settlement of the controversy.

People v. Barrondess, 133 N. Y. 649; 31 N. E. 240, 241.

It is unlawful maliciously to induce another to break his contract with the plaintiff.

Angle v. St. Paul, etc., R. R. Co., 151 U. S. 1, 13, 14, 15.

Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co., 159 Fed. 824, 830; 86 C. C. A. 648.

Persons who caused a master to discharge a servant, by threat of a strike, to compel the servant to pay a debt, were liable to the servant.

Giblon v. National Amalgamated Laborers' Union, 2 K. B. 600 (1903).

A conspiracy was held unlawful to persuade employees to join a union in violation of their agreement with their employer and to continue in the employer's service, for the purpose of ultimately coercing the employer, through a strike or a threat of one, to enter into a closed-shop agreement.

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229.

The decisions which limit the privilege of striking do not permit it to be lawfully exercised except to improve the bargaining power of the employees as to wages, hours and working conditions, and usually only by an immediate or direct but restricted, action against the employer, and not against one not a party to the original controversy. The method of these decisions, and the reasoning of many of them, show the courts were dealing with the problem of bounding a privilege and not a constitutional right.

Congress has made it a misdemeanor to persuade or induce an artificer or workman in an arsenal or armory to leave his employment under the circumstances indicated by the statute which we set out:

> SEC. 10207 (Crim. Code, sec. 43). *Enticing workmen from arsenals or armories.* Whoever shall procure or entice any artificer or workman retained or employed in any arsenal or armory to depart from the same during the continuance of his engagement, or to avoid or break his contract with the United States; or whoever, after due notice of the engagement of such workman or artificer, during the continuance of such engagement, shall retain, hire or in anywise employ, harbor or conceal such artificer or workman, shall be fined not more than fifty dollars, or imprisoned not more than three months, or both."
>
> Sec. 10207, U. S. Compiled Stat. 1918, Compact Ed.
>
> March 4, 1909, C. 321, Sec. 43, Stat. 1097.

VII.

The Strike Attacked the Constitutional Rights of the Fuel Company and Its Customers.

The defendant, living under the protection of the state, is bound to so conduct himself as not to hazard or infringe the rights of others, who are also living under its protection. The constitution does not permit him to attack the rights of other persons.

The Mackie Fuel Company and its customers had the constitutional right to do business. This right was assailed and its enjoyment was injured by the strike.

Both individuals and corporations have a constitutional right to do business.

Brazee v. People of the State of Michigan, 241 U. S. 340; 60 L. Ed. 1034.

Adams v. Tanner, 244 U. S. 590, 61 L. Ed. 1336; L. R. A. 1917F, 163.

Beecham v. Worley, 245 U. S. 60; 62 L. Ed. 149; L. R. A. 1918C, 210; Ann. Cas. 1918A, 1201.

People v. Rosenburg, 112 N. Y. S. 316; 59 Misc. R. 342.

Baldwin v. Escanaba Liquor Dealers Assn., 165 Mich. 98; 130 N. W. 214, 220.

And the right to do business is a property right.

See the cases *supra*, and—

Barr v. Essex Trades Council, 53 N. J. Eq. 101, 112; 30 Atl. 881, 885.

So men have a constitutional right to work.

Truax v. Raich, 239 U. S. 33; 60 L. Ed. 131; L. R. A. 1916D, 545; Ann. Cas. 1917B, 283.

Bogni v. Perotti, 224 Mass. 152; 112 N. E. 853.

State v. City of Sheridan, 25 Wyo. 347; 170 Pac. 1, 3.

These elementary rights were infringed by the strike. The Fuel Company for a time was prevented from operating its mine, and every person dependent upon that mine for a supply of fuel was

interfered with in the prosecution of his business. People whose work was dependent upon this supply of fuel were also injured.

The rights of the Fuel Company and its customers to operate their industries are not subject to impairment or destruction at the whim of anybody, and an officer of a labor union is not privileged to inflict such impairment or destruction any more than any person who is not an officer or member of the labor union. There can be no constitutional right in an officer of a labor union to do such an act which cannot also be vested in every person whatsoever. There is no such right in anybody in or out of the labor union. The calling of the strike in this case was malevolent and tyrannical, and cannot be sheltered under the thirteenth amendment or the fourteenth amendment.

VIII.

An Act Lawful for One May Be Unlawful for Several.

Though an act done by one person with a rightful intention be lawful, the same act done by a combination of persons in pursuance to a wrongful intention will be unlawful, and the combining of persons with a wrongful intention in order to do such act will be unlawful.

In the case of *Drew v. Thaw*, 235 U. S. 432, 59 L. Ed. 302, 307, the court said:

> "In the wide range taken by the argument for the appellee it was suggested, among other things, that it was not a crime for a man confined in an insane asylum to walk out if he could and that, therefore, a conspiracy to do it could not stand in any worse case. But that depends on the statute. It is perfectly possible, and even may be rational, to enact that a conspiracy to accomplish what an individual is free to do shall be a crime. An individual is free to refuse his custom to a shop, but a conspiracy to abstain from giving custom might and in some jurisdictions probably would be punished. If the acts conspired for tend to obstruct the due administration of the laws,

the statute makes the conspiracy criminal whether the acts themselves are so or not."

Aikens v. Wisconsin, 195 U. S. 194; 49 L. Ed. 154.

Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 440, 441; 54 L. Ed. 826.

Eastern States Lumber Ass'n v. United States, 234 U. S. 600, 614; 58 L. Ed. 1500.

Loewe v. Cal. State Fed. of Labor, 135 Fed. 71, 84.

Burnham v. Dowd, 217 Mass. 351; 104 N. E. 841; 51 L. R. A. 778, 784.

Cote v. Murphy, 159 Pa. St. 420.

Chicago W. V. Coal Co. v. People, 214 Ill. 421; 73 N. E. 770, 775, 776.

Franklin Union v. People, 220 Ill. 355; 4 L. R. A. 1001, 1013; 110 Am. St. R. 77 N. E. 176.

State v. Stock Exchange, 211 Mo. 181; 109 S. W. 675, 780, 781.

Lohse Patent Door Co. v. Fuelle, 215 Mo. 421; 114 S. W. 997, 1012, 1013; 22 L. R. A., n. s., 607; 128 Am. St. R. 492.

State v. Dalton, 134 Mo. App. 517, 535, 538; 114 S. W. 132.

State v. Huegin, 110 Wis. 189; 85 N. W. 1046, 1065, 1066; 62 L. R. A. 700.

Brown v. Jacobs Pharmacy Co., 115 Ga. 431; 41 S. E. 553; 57 L. R. A. 547, 554, 555; 90 Am. St. R. 126.

Bailey v. Master Plumbers' Assn., 103 Tenn. 99; 46 L. R. A. 561, 564-566.

Vertue v. Lord Clive, 4 Burrow 2472; 98 Eng. R., full reprint, 296.

Clifford v. Brandon, 2 Campbell, 358, 369.

IX.

The Statute Is Definite and Certain.

Sections 6 and 17 of the statute are set out in our statement of facts. Each of the two counts of the information is based upon sections 6 and 17 and charges a misdemeanor. Each of the two counts also contain allegations charging a felony under section 19 of the statute. The jury found Dorchy guilty of the misdemeanor, but not of the felony. Section 17 states, *inter alia*, "Provided, that nothing in this act shall be construed as restricting the right of any individual employee engaged in the operation of any such industry,

employment, public utility or common carrier, to quit his employment at any time." Each count of the information contained the allegation, "and that such ceasing of work by said persons, who ceased said work as aforesaid, was not an individual quitting of work by said persons, or an individual act of said persons, for the purpose of exercising any individual right, but was for the unlawful purposes aforesaid." (Rec. 14, 16.)

There are many offenses defined in the statute books of the United States and of the states in which the intent is an essential part of the offense. The jury, under the instructions of the court and the evidence, is required to determine the intent with which the act was done, and it cannot find a verdict of guilty unless it has found that the defendant had such intent in the commission of the act. There is no more practical difficulty in a jury ascertaining the intent under this statute than there is in its ascertaining the intent under many other statutes. The facts of this case are so plain that there could not have been any difficulty in the jury determining with what intent the act was done, and there could be many other cases supposed where the jury would have no more difficulty in such determination than in this case. Under the established practice, the statute was sufficiently certain and definite.

Nash v. United States, 229 U. S. 373; 57 L. Ed. 1232.

Waters Pierce Oil Company v. Texas, 212 U. S. 86, 109; 53 L. Ed. 417, 429.

X.

Conclusion.

Entirely aside from any question whether the coal-mining business can be validly declared by the state to be affected with a public interest, we maintain that the state had the right and the duty to prohibit as it did, acts for the purpose of hindering, delaying, interfering with or suspending the operation of a coal mine. The coal

mines in Kansas, in 1919, supplied about 65 per cent of the total amount of coal consumed in the state. The remainder was transported long distances from mines in Colorado, New Mexico, Oklahoma, Arkansas and Illinois. The long hauls much increased the cost of this outside coal. The coal produced in Crawford and Cherokee counties was of good quality, suitable for all uses, and particularly adapted to making steam. It was used in the state for all purposes.

District No. 14, United Mine Workers of America, had at least 9,000 members in Kansas and 2,000 members in that part of Missouri adjoining on the east Crawford and Cherokee counties, Kansas. All of the workers in the Kansas coal mines were members of the United Mine Workers of America, although those of them who worked in Leavenworth county belonged to another district than District No. 14. For years District No. 14 had domineered over and controlled the coal-mining industry in Crawford and Cherokee counties. There was no equality between the mining operators and District No. 14. That district controlled the situation. At its will, the operation of mines stopped or resumed.

Beginning in 1913 and extending until 1919, inclusive, the number of strikes in those coal mines continuously increased. They were frequent and on all sorts of frivolous excuses, and for no excuses. In the period from April 1, 1916, to December 31, 1919—45 months—there were 705 strikes in those mines, causing a loss of 799,194 days' work of miners, and a loss in wages to miners of $3,866,780.34. The inconvenience and financial losses to the operators and to their customers were enormous.

In one series of strikes at the mines of the Central Coal and Coke Company, beginning July 1, 1919, and lasting about six months, in which 925 miners were engaged, no reason was given to the employer for the strike, and the state labor commissioner and *ex*

officio mine inspector could not obtain from representative of the strikers any reason for it. In November and December, 1919, when there was a general strike of the unionized bituminous miners throughout the country and the Kansas mines were shut down, a vast amount of loss and suffering was caused to the people of the state, and it became necessary, in order to obtain coal for the most pressing necessities, that the state should take over the operation of the coal mines in Cherokee and Crawford counties, and, protected by a large force of miltia, volunteer workers operated some strip mines and produced coal which was used in hospitals and charitable institutions and to a slight extent for other necessary purposes.

District No. 14 of the United Mine Workers of America had established and maintained a destructive tyranny over the coal-mining industry in Crawford and Cherokee counties, and it became necessary for the state to abolish this oppression. The Kansas legislature, by the statute in question—chapter 29, Laws of Kansas, Special Session, 1920, approved January 23, 1920, and which took effect on publication in the official state paper January 24, 1920—undertook, among other things, to put an end to the reckless and cynical rule of District No. 14 over the main coal-mining region of the state and to enable the mines to operate and the people of the state to be supplied with necessary coal.

The conditions on which was based the rule making strikes privileged had long ceased to exist in the coal-mining industry in Kansas. There was no lack of bargaining power of the miners. Their demands as to wages, hours and working conditions were usually obeyed by the coal-mine operators. The extra cost to be incurred was passed to the consumer. The quality of the coal mined had deteriorated. Whereas, some years before, only about 25 per cent of the coal was slack, in 1919 about 50 per cent of it was slack, due to careless mining work of the union laborers. The more

thoughtful and thrifty of the coal miners had abandoned the occupation and obtained other kinds of work where they could have steady employment free from the losses imposed by strikes and free from the domination of District No. 14.

The statute did not forbid any individual from quitting work. It did not forbid any collection of indivduals from quitting work. It did not forbid any collection of individuals to quit work in concert, provided that concert was not for the purpose of hindering, delaying, interfering with and suspending the operation of a coal mine. The statute stated, in section 17:

> "*Provided*, That nothing in this act shall be construed as restricting the right of any individual employee engaged in the operation of any such industry, employment, public utility or common carrier to quit his employment, at any time, but it shall be unlawful for any such indivdual employee or other person to conspire with other persons to quit their employment or to induce other persons to quit their employment for the purpose of hindering, delaying, interfering with, or suspending the operation of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act."

The liberty to quit work was not interfered with. What was prohibited was the conspiring of persons, employees or otherwise, to quit their employment, or the inducing of employees to quit their employment, for the purpose of hindering, delaying, interfering with or suspending the operation of the industry. It was this purpose to obstruct or stop the operation of the industry which was made the essential element of the offense, and not the quitting of work, not the agreement to quit work, and not the quitting of work in pursuance to an agreement.

The protection of the people of the state against damages and suffering from the interruption or cessation of the supply of coal was the object to be attained. The prohibition was against an act with

a wrongful intent to do something which would necessarily inflict such an injury upon the people of the state. Most of the coercive power from obstructing or stopping operation of a coal mine lay in the fact that the customers who bought the coal would be injured, and to exercise this coercion over third parties would be within the plan of every person who intentionally, in the manner stated, endeavored to obstruct or suspend the operation of the coal mine. Whoever did such an act would be a deliberate and willful inflicter of damage upon others, and oftentimes widespread damage, which might include sickness and death from lack of fuel. There could be no "justification" in morals, in economic or public policy, or any constitutional provision for an act committed under these circumstances. It was an essential function of the state to protect its people against such evils, and the decisions of this court plainly show that the thirteenth and fourteenth amendments have not impaired the exercise of such a function by the state. It was never intended by any constitutional provision to grant to any person such a power of evil-doing. It would not be the equal protection of the law to permit an officer of a labor union to inflict this damage, although other persons outside the fold of the union or the body of the strikers should not be permitted to do so by other means than strikes. It would not be the equal protection of the laws to permit such an injury to be inflicted by a strike but not to be inflicted by any other method. It is against the property right of the mining employer, under the due-process-of-law provision in the fourteenth amendment, to tolerate such an injury. It is against the liberty of employees other than the strikers to permit such action. The liberty of a working miner to quit work can be enjoyed without a violation of the statute. The liberty of a working miner to make contracts can be enjoyed without a violation of the statute. The liberty of the employer to make and perform contracts cannot be enjoyed if

the statute is violated. The short-sighted benefit to the striker cannot permit the infliction of such a wrong any more than the immediate benefit which might be attained by any person in any other relation of life by causing the obstruction or stoppage of business of another could be allowed to permit such an action. No men or class of men in this country can be licensed to impair or destroy constitutional rights. The word "liberty" and its implications are repugnant to and irreconciliable with the theory of a privilege to inflict injury upon others for profit to the injuring party.

Respectfully submitted,

CHARLES B. GRIFFITH,
Attorney-general of the State of Kansas,

JOHN G. EGAN,
Ass't. Attorney-general of the State of Kansas,

Attorneys for Defendant in Error.

CHESTER I. LONG,
AUSTIN M. COWAN,
WILLIAM E. STANLEY,
Of Counsel.

APPENDIX A.

Copy of Proclamations of Gov. Henry J. Allen, Calling Out the Militia for the Protection of Mining Operations During the Coal Strike of 1919.

STATE OF KANSAS, EXECUTIVE DEPARTMENT,
TOPEKA, KANSAS, NOV. 29, 1919.

General Charles I. Martin,
Adjutant General, Topeka, Kansas:

SIR:—

WHEREAS, It has become necessary for the state to take over mining operations in Crawford and Cherokee counties for the purpose of preventing a fuel famine in this state, it has been thought wise to direct the mobilization of the National Guard for the protection of the volunteer mine workers, the safeguarding of property and the upholding of the dignity of the state.

Therefore, You are hereby directed to proceed at once with the Fourth Regiment, Kansas National Guard, to the coal fields in Crawford and Cherokee counties for the purpose of giving whatever protection is necessary to these mining operations and to the lives of the volunteers who are accepting service in the mines. Attention should be called to the fact that this is in no sense a movement of aggression against the striking miners, and you will caution your men to maintain toward the miners who are on the strike an attitude of patience, firmness and forbearance. These union miners should be made to feel that this is the unavoidable action of the state which has taken over the mines for the purpose of producing coal for its people.

You will notify the civil authorities of your readiness to coöperate with them in the maintenance of law and order and should any condition arise which passes beyond the police capacity of the local authorities. It is my desire that the presence of the troops in this district shall not interfere in any way with the normal activities of individual and commercial life, their presence there being merely a guarantee that the rights of all shall receive adequate protection in the face of a possible disorder. If, however, at any time, it becomes apparent, in your judgment, that through unwillingness to

act or inability to maintain law and order, a critical emergency is produced, the situation shall be taken in charge. You have full authority to use all the power at your disposal to maintain the peace, preserve the safety of all citizens and protect property.

IN TESTIMONY WHEREOF, I have hereunto set my hand, and caused to be affixed the great seal of the state of (SEAL) Kansas, here at the state capitol, in the city of Topeka, this 29th day of November, in the year of our Lord, one thousand nine hundred nineteen.

By the Governor: HENRY J. ALLEN.

STATE OF KANSAS, EXECUTIVE DEPARTMENT,
TOPEKA, KANSAS, Nov. 29, 1919.

General Charles I. Martin,
The Adjutant General, Topeka, Kansas:

SIR:—

For temporary guard service in the coal district, you are hereby authorized to recruit four companies of provisional infantry, the commissioned and enlisted personnel to be limited to men having had prior military service in the army during the World War. The units organized under this authority will be discharged upon termination of the present emergency.

As rapidly as recruited, the organizations will be sent to the coal district, either by companies or detachments, as you may deem advisable.

IN TESTIMONY WHEREOF, I have hereunto set my hand, and caused to be affixed the great seal of the state of (SEAL) Kansas. Done at the state capitol, in the city of Topeka, this 29th day of November, in the year of our Lord, one thousand nine hundred nineteen.

HENRY J. ALLEN,
Governor.

APPENDIX B.

The Governor's Call for Coal Diggers.

(Published in Topeka *Daily Capital*, November 27, 1919.)

WANTED—One thousand able-bodied young men to dig coal to "keep the home fires burning" in Kansas. Experience unnecessary. Hardy young men able to take care of themselves and to wield a pick and shovel preferred. Travel expenses and at least $5 a day guaranteed by the state of Kansas. Also forty-five engineers to run steam shovels in the Kansas strip mines, with an equal number of firemen. Can use also a limited number of men accustomed to use of dynamite. Apply in person, by telegraph, telephone or by mail, to Gov. Henry J. Allen, statehouse, Topeka, Kansas.

APPENDIX C.

Proclamation.

To the Members of the Senate and the House of Representatives of the State of Kansas:

An extraordinary occasion has arisen in the history of our state. A nation-wide strike of coal miners in the bituminous coal fields began on November 1, 1919, and has constantly continued. We were at the mercy of a fuel famine. The emergency in Kansas was so poignant that it became necessary for the state to take over the mines and call for volunteer workers to produce coal for the needs of the pepole. It became advisable also that the state troops should be called upon to preserve order in the mining districts, protect the volunteer workers and the property taken over by the state. All of this was done, and coal is now being produced by college boys, returned soldiers and sailors and other volunteer workers, for the most part unskilled in the art of mining. With a spirit as unselfishly patriotic as ever called men into service, they have undertaken this task in order that the people might not suffer.

This has put the state to some expense and funds are needed with which to meet a deficit in the appropriation of National Guard funds. More important than this, however, is the now clearly apapparent need of legislation to provide a means by which such a condition may be prevented in the future. The state stands in imminent need of industrial legislation which will enable it to settle the controversies now impending and to prevent a recurrence of other such difficulty.

During all the years in which the general public has been victimized by controversy between capital and labor we have made no substantial progress along the lines of constructive legislation. No plan has been suggested outside of arbitration. There has been in the minds of men who sought to settle this problem for a number of years a philosophy favoring compulsory arbitration, but to-day probably there is nothing more distasteful to the laboring man than this. As a matter of fact, arbitration holds no guarantee of justice. The best that any man can hope for out of it is a compromise. When two sides, each with a grievance, select a repre-

sentative, and these two representatives select a third man, it becomes a sort of an industrial gamble as to which side has an advantage with the third member of the board. He may do either one of two things: He may join one side or the other and get a partisan decision, or he may jockey between the two sides and secure a compromise.

Obviously, there must be some fairer way for the solution of such controversies than this. The hour has come when the biggest right in the situation is represented in the general public welfare, and no civilization is safe when the welfare of the people is made the subject of arbitration. We cannot leave the functions of commerce, industry and all the essential activities of human life to an umpire who is seeking to satisfy two selfish parties in a quarrel. For the making of this quarrel the public is not responsible, but it affects the helpless public more vitally than either of the two interested parties. Outside of arbitration, the other alternative left to labor for the settlement of its grievances is the srike; the only alternative for capital is the lockout; either of which stops production and leads to industrial warfare, which is often attended by many of the barbaric features that have always characterized warfare.

If, however, you are to do away with these seventeenth century methods of solving industrial problems, then you must guarantee to laborers and to employers a just tribunal in which their causes may receive final and righteous judgment. This tribunal should not have upon it a representative of either party to the quarrel; otherwise it could not be impartial. Its personnel must be composed of men of integrity and irreproachable character, of broad sympathy, possessing a high sense of justice, who are in no way directly interested in the issues involved, and, who, therefore, can hear and consider both sides of the question while they are giving due consideration to the paramount rights of the public.

Men may say that it is not possible to secure a tribunal with such powers of just and righteous judgment as will be possessed by the tribunal which the Kansas legislature will be asked to create. Doubtless there was a day when men thought it would not be possible to secure, through the operation of a criminal court, justice to causes which would be brought into that court; doubtless the feudal barons once thought there was no better way of establishing property rights than the rule of the strongest baron, yet to-day no man may question this efficicacy of the criminal or the civil courts.

Into this crowded hour there has come a social unrest that directs its attack upon organized government. To meet it there must be new standards, and these standards must hold, above all things else, equal and exact justice. We must not take away from any man his personal rights, and we must not deprive men representing industry the privilege to organize for their own betterment; but above the system, as guarantor of the rights of all, must stand the government, and it alone must have the power of final judgment.

It would be the most ironical episode in the history of the world if the freest government on earth should allow itself to be trapped into a condition where all of its functions waited upon the quarrel between the owners of some essential industry and its employees, while the people froze, starved or went naked because the natural avenues of production were stopped by a ruthless quarrel, in the making of which the people had no part.

I believe that the Kansas legislature, now summoned to give deep consideration to industrial relations, will be able to create in bold outline a tribunal and a code of laws with sufficient power to be both just and final.

Therefore, in view of this extraordinary demand, I, Henry J. Allen, governor of the state of Kansas, by virtue of the power and authority vested in me by the constitution of the state of Kansas, do hereby call an extraordinary session of the legislature of this state to convene on Monday, January 5, 1920, at two o'clock p. m., at the statehouse in Topeka, Kansas.

HENRY J. ALLEN, *Governor.*

Attest: L. J. PETTIJOHN, *Secretary of State.*

Done at Pittsburg, Kan., this 8th day of December, 1919.

APPENDIX D.

To the Members of the Legislature:

An extraordinary need for additional legislation was revealed during the last two months by a most daring attempt to override government and make the public the helpless victim of a fuel famine. With a heartlessness that has no parallel in the history of the industrial quarrel the public was told that, while the controversy over a wage scale was going on between capital and labor, it could freeze. The operators would make no effort to operate the mines and the union miners' officials stated that no one would be allowed to attempt production of coal until the demand they made for a sixty per cent increase in wages and a shortening of working time to six hours a day, five days a week, should be granted by the operators. In the midst of winter, with the shortage of coal which usually confronts this section of the country because of indifferent mining during the summer months, operations ceased. All relations between operators and miners were broken off and the two sides watched each other with sullen hostility. It was estimated that the reserve supply in this section under the most economic use, would provide for not over two weeks of fuel. Both parties to the quarrel had supplied themselves with sufficient coal to keep themselves from freezing, and the attitude to the public was of that callous indifference which has become familiar to the public. In Kansas, public institutions began closing down rapidly. In many communities schools closed almost immediately. There was suffering in homes and in hospitals. If the situation had gone on two weeks without relief actual death would have accompanied the fuel famine. The baleful determination of the miners' officials that no relief should be granted the public during the quarrel is illustrated by a typical incident at Pittsburg, where the principal hospital of the town, located in the very heart of the coal district, was allowed to go without coal until the state stepped in to provide relief. Two union miners who had attempted to operate a small strip pit for the sole purpose of relieving that hospital were warned to quit. It was pointed out to the miners' officials that death would ensue unless relief were allowed to the helpless sick in that hospital. Neverthe-

less, the edict of the coal miners' officials was that not a pound of coal should be produced to relieve even a poignant demand of that character.

While these tragedies were impending, the state, through a receivership ordered by the supreme court, took charge of the mines and spent a week urging the miners to return to work for the state to relieve the public from the menace of the famine. A proposal similar to the one they accepted several weeks later at Indianapolis was made them by the state of Kansas. Many miners expressed the desire to accept it, but the leaders refused to allow them to return to work. A large number of miners expressed to me their desire to work, their lack of sympathy with the effort to freeze the public; but said that if they should go back to work their property would be in peril, their families humiliated, and their very lives endangered. The state then called for volunteers to take charge of the mines. The response to the call provides as fine an exhibition of their patriotism as has ever been given by the people of this state. More than ten thousand men, from every vocation in life, enrolled. From this great offering about one thousand men, many of them from the schools and colleges of the state, a large number of whom were ex-soldiers from the American Legion, were chosen. With unselfish devotion, during the severest weather of the winter, they hurried to the coal fields. With them went the Fourth regiment of the Kansas National Guard for the purpose of maintaining order in the district. The volunteers and the guardsmen reached Pittsburg upon the same trains and proceeded at once to the strip pits of the district. While the guardsmen were making their camps and establishing guard lines, the volunteers began working in the mines. Not a moment was lost. The weather at times was below zero, and both guardsmen and volunteers lived under most uncomfortable and trying conditions. Yet there was little complaint, and the very first day of the operation cars were loaded with coal. The second day the output increased, and it grew with every day until, at the end of two weeks, the volunteers had produced a sufficient quantity of coal to relieve the emergencies in 200 Kansas communities. The union miners and operators alike had predicted that it would be impossible to produce, through volunteer effort, any coal in this district, which has been 100 per cent unionized for many years. Miners' officials had boasted for a long time that not a pound of coal would ever be mined in that district except by union miners. Yet,

under state operation, in two weeks the mines that had been lying idle in the dead of winter, with the machinery out of repair and the pits flooded with water, were placed in working condition by inexperienced men, many of whom had never seen a coal mine.

Under weather conditions so severe that in normal times these pits would not have been operated at all, a quantity production of coal was reached. During the first ten days of the receivership, two hundred cars of coal were mined through volunteer effort in Crawford, Cherokee and Linn counties. During the entire period of the receivership something like seven hundred cars were produced, but the two hundred cars accredited to the first efforts of the volunteers do not give any adequate measure of the practical value of their services in the mines. It was necessary to expend very much time and effort to get the idle mines back into condition for operation. The work they did in restoring these mines to productivity was at least equal, in value, to the production of two hundred additional cars of coal. When the volunteers went out and the union miners returned the latter found the pits in better shape than had characterized those mines for a long time. The water had been pumped out, new drainage conditions established and the machinery placed in better condition; in some mines better equipment provided and the possibility of increased productivity established. That the action of the state, in entering the situation, not only warded off the danger of famine, but hurried forward the settlement of the strike, no thoughtful person doubts. I am told by the receivers that the proceeds from the sale of coal will take care of the cost of mining operations.

I believe, however, that it would be a great error if Kansas, having taken advantage of the unselfish devotion of these volunteers to relieve the immediate emergency, should now neglect to provide at once safeguard against the recurrence of this expensive and dangerous form of industrial warfare. As we review the growing quarrel between capital and labor we are all impressed with the fact that we have made absolutely no progress toward the provision of a just and orderly basis of solution. Every settlement of every controversy has been upon a temporary basis, and the sole concern in every temporary adjustment has had to do with the advantages of capital or labor. Into few controversies does there ever come a consideration of the rights of the public. The largest party at interest scarcely receives a hearing. I believe the time

has come, in the increasing industrial life of the country, when a tribunal should be established which shall have the power to take under its jurisdiction the offenses committed against society in the name of industrial warfare, a tribunal which shall have the authority to meet industrial discontent, before it crystallizes, by a careful oversight and regulation of the conditions of labor before any injustices are allowed to fester and breed class hatred and bitter antagonisms.

There is no reason why government should not have the same power to protect society against the ruthless offenses of industrial strife as it has always had to protect it against recognized crime. I have called the legislature into extraordinary session in the hope that we may create a "Court of Industrial Relations" which shall provide a substitute for strikes and lockouts and protect the public against the abuses which now come upon it during the course of industrial controversies. In the accomplishment of this purpose and the added need of a better and surer provision for the welfare of workers, and the protection of their rights, there is a broad field of effective service for a court of this character. Such a court must hold the possibility of equal and exact justice for employers, employees, and the public. It should represent, in its broad power, government, with all of its dignity and righteous justice. If moral principles do not exist in Anglo-Saxon institutions to justify their extension to meet this vital American need, then Anglo-Saxon institutions are doomed to failure. It must be apparent to all that we cannot allow the erection in this country of a recognized condition of warfare between government and any organized portion of society which claims the privilege to menace the public and to challenge government itself. Any minority which has secured control of a product upon which human life depends, and which undertakes, for the purpose of affecting wages or profit, to withhold that product from the public until the public shall freeze or starve, has, in effect, superseded government and has arrogated to itself the control of the destinities of human life which government alone may have the power to safeguard.

Events of the recent months have unveiled the startling dangers of a conscious purpose to build in this country, out of a minority, a deliberate process of intimidation which sets government at naught. Its radical leaders think of nothing but their own class interest. If allowed to go on, this destructive philosophy would wipe out all

that the ages have builded for society. It may be urged that government has not the power to protect itself against the offenses which arise in industrial warfare. The thought of establishing a court of this character is not a new one. It has come out of the evolution of a hundred years during which industrial controversies have been growing in number and importance. This evolution has brought us to the same point of determination that society reached after the evolution of events had brought the need of the criminal and civil courts. I am not unconscious of the fact that labor has bettered its condition through its organized solidarity; that capital has been forced to make concessions under threat which it should have made voluntarily, and I would be opposed to any form of legislation which deprived labor of the proper use or benefits of wholesome organization. But certainly the trend of events has convinced us all that the final appeal in labor controversies shall no longer rest on the issue of an industrial war. . . .

Respectfully submitted, HENRY J. ALLEN.

OFFICE OF THE GOVERNOR,
January 5, 1920.

□

10-1680

Office Supreme Court, U. S.
FILED
JAN 17 1924
WM. R. STANSBURY
CLERK

No. 163

DORCHY

vs.

STATE OF KANSAS

POINTS MADE BY DEFENDANT IN ERROR IN ORAL ARGUMENT

I

The strike at the Mackie Fuel Company Mine on February 4, 1921, was illegal because the employees who struck had no dispute of their own with the Fuel Company. The act of Dorchy who induced the strike was, therefore, also illegal.

II

The strike of the employees and the act of Dorchy in inducing it were also illegal because an attempt was made to adjudicate the claim of Mishmash against the Fuel Company by coercion and intimidation instead of giving the Fuel Company its day in Court.

III

The Strike was illegal because it attacked the Constitutional right of the Mackie Fuel Company, and its customers to do business. The strike being illegal, the act of Dorchy, who induced it was, therefore, illegal.

IV

This strike was not only illegal under the decisions of the Courts but was also in violation of an injunction then in force issued by the District Court. The Supreme Court of Kansas affirmed the ruling of the District Court in adjudging Dorchy guilty of contempt. This Court held (258 U. S. 181) that no right of Dorchy under the Fourteenth Amendment was invaded.

V

The act of Dorchy being illegal the Industrial Court Act making it a crime was not unreasonable or arbitrary as to him, and no right of his under the Fourteenth Amendment was invaded.

Charles B. Griffith, Attorney General of the State of Kansas; John G. Egan, Ass't Attorney General of the State of Kansas, Attorneys for Defendant in Error. Chester I. Long, Austin M. Cowan, William E. Stanley, Of Counsel.

APPENDIX E

Proceedings Before the Court of Industrial Relations With Reference to the Claim of Carl Mishmash

After the strike in question was called the Court of Industrial Relations took jurisdiction of the controversy presented by the strike under Sec. 7 of the Industrial Court Act and the following proceedings were had:

Order Taking Jurisdiction

In the Court of Industrial Relations of the State of Kansas

Docket No. 3980

In the Matter of the Investigation of the Strike and Causes Thereof, at the George K. Mackie Fuel Company's Mines Numbered "H" and "J," in Cherokee and Crawford Counties, Kansas, Respectively; Labor Conditions Affecting said Mines, and the Causes of said Strike and Any Controversies Relating Thereto Between the Employers and Employees at said Mines

Order

Whereas, it appearing to this Court, from the evidence of witnesses sworn and testifying in a proceeding in the district court of Crawford County, Kansas, which the judges of said court attended, in pursuance of their duties, under the laws of the State of Kansas, that strikes and entire cessation of work on the part of the miners and workmen at said mines exist having been unlawfully called by the district board of District No. 14 of the United Mine Workers of America, a labor union, on or about the 4th of February, 1921, and,

Whereas, the employees at said mines are each and all members of said labor union, and are employed and working under the terms and conditions of a collective bargaining contract, entered into between the District Board of said labor union, in behalf of the membership thereof, on the one side, and the owners of said mines upon the other, and,

Whereas, said evidence revealed that certain apparent controversies existed between said labor union and its membership on the one side, and their employers upon the other, which led to an emergency, and the calling of said strike, and that the said employers and employees are still unable to reach an agreement for the continuation of work, and the operation of said mines with reasonable continuity, as required by law, and,

Whereas, a claim on the part of one, Carl Mishmash, for increased compensation over what has been paid him by the company for his

services, as a miner, appears to be an important issue among said controversies, and,

Whereas, said strikes and cessation of work in said mines and the operation thereof threaten to, and do limit production of coal in said mines, in said counties and state, and do endanger the peace and order and the general welfare of the people of the State of Kansas, in said counties, and in said state.

Now, therefore, the Court upon its own initiative, hereby orders that a full and complete investigation of all of the causes leading to said strike and cessation of work, and of the operation of said mines, be held, and entered upon by said Court, and that the testimony of witnesses be taken, and all other information obtained for the court to enable it to make such orders as are authorized by law to enable said mines to be put in operation and said working men to return to work therein until said parties shall agree upon the settlement of said controversies and to the end that the said limitation of supply of coal may be prevented, peace and order restored, and the threatened danger to the public welfare be averted.

It is further ordered, That the Court in said investigation shall obtain full and complete information concerning all of said controversies and the working conditions obtaining in the vicinity of said mines, and in the operation thereof.

It is further ordered, that due and legal notice be given to all interested parties, including the George K. Mackie Fuel Company, the District Board of District No. 14, of the United Mine Workers of America, and particularly to the local unions holding membership of the miners working in said mines, to the Southwestern Coal Operators' Association of the said mining district No. 14, taking in the said District No. 14, of said labor union, and to the said Carl Mishmash, by delivering a copy of this order to each of said parties, according to law, in all cases where the same is possible, and said parties will hereby take notice of the said investigation hereby ordered, and that unless they, and each of them appear and show cause why the same shall not be done, the said Court will, in said hearing, make and enter such orders as it is authorized to make under the laws of the State of Kansas, to fully settle said controversy, fixing the conditions under which said mines shall be operated and said workmen returned to work until the said parties may reach an agreement in full settlement of all of said controversies and further fixing and determining, if the same shall be necessary, reasonable rules and regulations as to labor conditions, which shall be observed in the operation of said mines in the future.

It is further ordered, that said hearing shall be held at the Court Room of the District Court of Crawford County, Kansas, Division Number One, in the City of Pittsburg, Kansas, on the 18th day of February, 1921, at nine o'clock, A. M.

It is by the court so ordered.

R. C. Dellinger, Assistant Clerk.

O. K. W. L. Huggins, C. M. Reed, George H. Wark, Judges of said Court.

Judge Huggins: Well, this, of course, is an unusual situation and it is the first case of this kind that has came before the Court of Industrial Relations. It is the kind of a case that this court would have no jurisdiction of at all, it would be just like that Dixon and McAllister case yesterday, if it were not for the fact that it is alleged, at least, that it has resulted in the suspension of two mines, suspension of operation. It is one of those controversies that has resulted in lessening of the production of coal in the calling of a strike and in an industrial conflict which, while it has not yet assumed vast proportions, has in it possibilities of a still greater industrial conflict.

Now, I am inclined to think that if Karl Mishmash himself were before this court asking for an order requiring this employer to pay him these back wages and if there were no immediate danger of a strike or some other disturbance that might lessen the production of coal and throw people out of employment, we would not have any jurisdiction over it, we would have to refer him to the courts of general jurisdiction. As a matter of fact, that is where this should have been taken in May or soon after May, 1918. There was no reason why it should not have been taken into the courts of general jurisdiction, suit brought on that contract, that collective bargain, evidence given as to what the contract is and the customs that have grown up and the date of this young man's birth established and a judgment rendered by the courts of general jurisdiction.

There is a great deal in what Mr. Curran says about that. That is what should have been done but that was not done; there is not any evidence here, either in this case or in the evidence that was given in the case before Judge Curran yesterday and day before that shows even that the attorney for the District Board ever was consulted or that his advice ever was taken as to how the evidence could be procured to show the age of this boy but in the way that those things are done down here, the matter was taken up, considered by the Joint Board—I forget what they call it—Joint Board of the miners and operators and everything was settled in favor of the boy except the question of his age, which was the only question that seemed to be very important. That was left open.

Now, as to the blame that attaches to Mr. Morton as superintendent of this mine and to Mr. Richardson and Mr. Howat and whoever else was on that joint board, I think the blame is about equally balanced all around. I do not know that there is any blame. Controversies like that come up in business life very often and when the parties fail to agree they go into court with it and it is settled by the court and there is no conflict and very often little, if any, ill feeling, so I get back to that original proposition there was no reason why this matter should not have been settled in the courts at the time and all possibility of friction removed but that was not done.

Now, the evidence that was produced before that board, and it was produced before Mr. Morton, of course, is unsatisfactory. Anybody can see that. The Bible has two dates, Mr. Howat testified to that in the district court. The only difference between Mr. Howat's testimony and Mr. Morton's was that Mr. Morton said the lead pencil memorandum that they showed him looked like it had been recently written in. He thought it was recently written. In other words, he thought they had fixed up something on him and he went further than that. Mr. Morton not being a lawyer probably don't realize how unsubstantial and unsatisfactory the school records are to prove from the school records. Two or three different dates as to this boy's age and there was the other proposition, the boy had been working even after—if we believe this testimony of Mr Spahn, he was 19 he had been working at a boy's job and the mine was paying him the wage of other boys who did the same work so that, so far as that part of it was concerned, it looked fair enough.

When you come right down to the actual facts in this case, gentlemen, this was a technical proposition. It was technical. It rested not upon the kind of work the boy was doing nor upon the fact that he was not being paid for what he was doing, it rested upon the technical proposition that he was 19 years old, he was entitled to a man's wages and up until the day he was 19 years old he was not entitled to a man's wages and all this trouble came out of that.

Now, if the joint board had called in Mr. Callery or Mr. Curran, here, or any other lawyer, put it in his hands, all the probabilities are in two or three days he would have had the evidence which would have established this boy's age and the money would have been paid and that would have been the last of it. It is surely a sad state of affairs when a little, miserable controversy like this should be dragged along for two or three years and finally cause men to be called out on strike and lose wages and the public be interested and the State put to a big expense to settle a little matter like this but here we are, we cannot help that That is what has been done.

Now, in regard to this evidence of Mr. Spahn, the court don't consider that evidence alone, of course. We do consider the evidence of the mother's affidavit, although, judging from the statement she made in the first place, at that time, at least, she was uncertain. I never knew of a mother to be that uncertain before. I will plead guilty if you would ask me about the birth of my own children, I do not believe I could tell you any better than she did, but the mother generally remembers the exact date and year and day of the month and, generally, the day of the week when the child was born. In this case at one time, at least, she was uncertain but the court considers that affidavit that was read here by Mr. Richardson wherein she testifies to the exact date of his birth. That testimony of the mother up to that point was contradicated by other circumstances and so on, so that the court would have hesitated—I will be frank with you—the court would have hesitated to make the finding that the boy was born on that date without any further testimony but now here is the testimony of the superintendent of the mine that the boy was, on the first of April, 1918,

put to a man's work and was able to do it and did do a man's work, which shows that he was of a man's size and strength and able to do that kind of work and then comes the god-father of this boy, a man who, from his appearance on the witness stand, I do not believe would have the hardihood to try to fix up any story to try to say anything that was not the truth, apparently an honest man, a man who is disinterested and he did not testify with that positiveness that you would expect if he were fixing up a story. He testified in a very modest way; he says he was the god-father, he says he was present at the christening, he knew these parents, he knew them before they were married, he knew where they lived, he was a friend of the family's and he remembers that this was their first-born and he was called in as the god-father and was present at the christening and he was a native of Austria, he had come over here in 1893 and this was only five years afterwards and he was talking with other natives of Austria and they were talking about the assas-ination of the Empress, I suppose a good deal as Mr Curran and Mr. Jackson and the members of this court would talk, if they happened to be in China and heard about the ass*i*s-ination of the president of the United States. Now, that was fixed in this old man's mind, he was a young man then, it was fixed in his mind and he remembered they got that news and were discussing that question at this christening but he did not remember the year, did not pretend to remember the year, and so we resort to the library here, which was open, by the way, to the board and to that joint board the same as it was to this court, and confirmation of Mr. Spahn's testimony is complete when we read in this book, which is a standard authority, that the empress was assas-inated on the 10th of September, 1898 and, to my mind, gentlemen; that fixes this boy's birth. I am satisfied with it and my associates are satisfied. We believe that Karl Mishmash was born on the 31st of August, 1898.

Now, I do not want anything that I have said to be considered as a reflection either on the operators of the mines or the district board or the joint board, I simply say that they went after things in a rather clumsy way and they did not give it the serious consideration it should have had in view of the fact that it might grow into such a calamity as has happened, apparently. They should have gone further. Mr. Howat and the members of the district board, knowing as they did the contradiction in this Bible and matters with regard to the school census, should have gone further. They should have produced some more evidence and the joint board should have done that. It was up to them and, as managers of the mine, the matter was referred in the ordinary course of their business to this joint board and they should have made this investigation and as I say, if they could not establish it and could not agree, the matter should have been taken into the district court or even into a justice of the peace court for the sum involved was within the jurisdiction of the justice of the peace and it is a shame they did not do that.

Now, the question is before us in this light. This is alleged to be the cause of this strike and it is the only cause that has been assigned. It seems almost incredible, gentlemen, it seems almost incredible

that, after all these years that Mishmash, not now in the employ of the mining company, having left the neighborhood and gone away and, so far as the evidence in this case shows, having dropped it himself, it seems almost incredible that this matter should have been made the occasion for the calling out of more than 200 men from their work and the loss of wages which result and violation of the law and jail sentence against the persons that called the strike. It seems almost incredible, almost beyond belief, and yet that is what we have, that is all they say is the cause of the strike order. The strike order gives that as the cause.

Mr. Curran: Your Honor, could I say just a word here, please?

Judge Huggins: Yes, sir.

Mr. Curran: You rather suggest in your declaration here that the company had not gone into court in this. If the court had said, Your Honor, this boy was of age on August 31, 1918, this company would not have had to have been sued. Now, this company never has been sued. I do not want, on behalf of the company here, Your Honor, just what I am telling you in my first talk, that we will do what the order would call for before we knew what your order would be. Of course, I surmise what your order is going to be now but here is what I want this court to know and that is, there would be no necessity of suing this company in the justice court or any other court, even though they did not have to pay attorney's fees, this company would not have had to be sued if there had been an order of the joint board to the George K. Mackie Fuel Company, this boy was of age on August 31, 1918, there would not have been a second word about it.

Judge Huggins: I see I did not make myself as plain as I should when I said they did not go as far as they should have gone. They quit the game before they got it settled. They left this open question as to the date of this boy's birth when they should have settled it. That is what I meant when I said they should have called in their attorney, Mr. Callery, or you or somebody else who would have shown them how to develop these facts. That is true, this question never has been settled as to the date of the birth of this boy.

Now, the condition that exists down here now demands immediate attention. The district board has not come into this court, have not assisted us any in arriving at these facts, the members of the local union have not assisted any, we have had to go to work and do the best we could to learn these facts and an order will be drawn here or findings will be made and the finding will be that Karl Mishmash was born on the 31st day of August, 1898 and that the amount of the back wages ought to be paid to him with legal interest from the date he demanded it. Now, as to how that ought to be done. This money should be paid over—the amount of the back wages from August 31, 1917 until April 1, 1918 with interest at the legal rate, 6 per cent, from the 22nd of March, 1918, as I understand that is the date he demanded this pay.

Mr. Curran: Now, Your Honor, have you not got that a year too soon?

Judge Huggins: No, I say March 22, 1918 he demanded it and

they put him on full pay April 1, 1918—should be paid over to the clerk of the district court of Crawford County, Mrs. Edna M. Burns, and she should hold that money until Karl Mishmash himself appears here to claim it. She should then take his receipt for that amount.

Now, we do not know where Karl Mishmash is but surely somebody can find out where he is and notify him of this. Mr. Curran, how long would it take to put those mines in shape to open, now? Could that be begun Monday morning?

Mr. Curran: This is Friday, isn't it?

Judge Huggins: Yes.

Mr. Curran: I think so.

Judge Huggins: They could do that, could they?

Mr. Curran: Yes, we can put it in operation.

Judge Huggins: All right, the finding will further be that the company should open this mine and be ready to mine coal Monday morning at the usual beginning time, blow the whistle in the usual way and, the alleged cause of this strike having been removed, the finding will be that the strike should be called off and the men permitted to return to work. That part, of course, will be directed to the local union and the district board also.

Mr. Curran: Now, Your Honor, I would like to have a formal order so that I could transmit it to the office. However, the soul of this order I will telephone them this afternoon and the company will do everything it can but the fact is, they will have the mine open unless providence should come in and prevent by floods or catastrophe which we have no power over.

Judge Huggins: This money ought to be in the hands of Mrs. Burns, if possible, Saturday and, if not, early Monday. The banks are open all day tomorrow.

Mr. Curran: That will be in Mrs. Burns' hands if I have to personally pay it, Your Honor.

Judge Huggins: Now, have I covered all these points? Of course, the formal order will be drawn but I will follow this statement as closely as possible.

Mr. Curran: Do we need to furnish this data as to when he went to work and so on, that the Court wanted Mr. Mackie to furnish today?

Judge Huggins: Well, I think not. If there should be any mistake in your calculation as to the amount due, why, it will be small anyway and it could be corrected.

Mr. Curran: It could not commence back of August 31, 1917, anyway.

Judge Huggins: A copy of the order that will be drawn yet this afternoon and following the statements that have been made here will be served upon the district board of the U. M. W. of A. and upon the operators' association—I never can remember the name of it—the Southwestern Interstate Coal Operators Association, upon the superintendents of these mines, H. & J. and upon the officers of the local union to which these men belong.

IN THE COURT OF INDUSTRIAL RELATIONS OF THE STATE OF KANSAS

Docket No. 3980

In the Matter of the Investigation of the Strike and Causes Thereof at the GEORGE K. MACKIE FUEL COMPANY'S Mines Numbered "H" and "J," in Cherokee and Crawford Counties, Kansas, Respectively; Labor Conditions Affecting said Mines, and the Causes of said Strike and Controversies Relating Thereto Between the Employers and Employees at said Mines.

ORDER

Now on this 18th day of February, 1921, this matter comes on for investigation and trial; the people of the State of Kansas appear by F. S. Jackson, attorney for the Court of Industrial Relations, the said George K. Mackie Fuel Company appears by John P. Curran its attorney and by John Morton, its superintendent, the District Board of the United Mine Workers of America appears not by either of its members or by its attorney, Local Unions numbers 310 and 498 whose membership are engaged in the work of mining in the mines affected appear not neither by their officers nor by attorneys and the matter proceeds and evidence is introduced by both the parties present, and also by the Southwestern Interstate Coal Operators Association which appeared by its commissioner George Richardson. And it appearing that due and legal notice of this hearing has been served upon all of the interested parties above named. There being a large number of citizens in attendance and in the Court room, many of whom are miners, ther Court calls upon any members of the District Board of the United Mine Workers of America, or any officers or members of the Local Unions affected to come forward and give such evidence as they may have in the premises, but there is no response to said invitation and the evidence is introduced.

The Court finds from the evidence in this case that the alleged cause of the present strike in mines "H" and "J" of the George K. Mackie Fuel Company is the non-payment of certain moneys alleged to be due one Karl Mishmash and that the controversy with regard to the said Karl Mishmash is as to the date of his birth, and the date of his coming to the age of nineteen years; that the substance of said controversy is that on the part of the said District Board it is claimed that the said Karl Mishmash was born on the 31 day of August, 1898 and was therefore entitled to the wages of an adult miner on the 31st day of August, 1917; that on the part of the operators of said mine it is claimed that the said Karl Mishmash was not born until the 31st day of August, 1899; that he never demanded the wages of an adult until March 22, 1918; that in compliance with his demand he was placed upon the pay rolls as an adult on the 1st day of April, 1918 and given the work of an adult and that therefore no money is due him.

The Court further finds that the said Karl Mishmash left the employ of said mining company something more than one year prior to this date; that he has removed from the locality and his whereabouts are at this time unknown to the Court, no evidence having been produced showing his present whereabouts.

The Court finds from the evidence however that the said Karl Mishmash was born on the 31st day of August, 1898 and was therefore entitled under the contract of employment and under the rules and customs of the miners and operators in this district to the pay of an adult beginning on the 31st day of August, 1917.

The Court further finds that the said George K. Mackie Fuel Company should have paid to the said Karl Mishmash for the difference between the wages that he was receiving and the wages of an adult in said mine from August 31, 1917 and that they should now pay to the said Karl Mishmash the difference in wages between the wages actually paid and the amount of the wages he would have received from said August 31, 1917 to April 1, 1918 with interest at the rate of six per cent from and after the date of the demand for the same which the evidence shows was March 22, 1918.

The Court further finds that said money should be paid over to the Clerk of the District Court of Crawford County, Kansas, Mrs. Edna M. Burns, as trustee, to be paid over to the said Karl Mishmash upon his receipting therefor and his proper identification.

The Court further finds from the evidence that the strike in said coal mines resulting from said strike order caused an entire cessation of production of said mines.

It is therefore directed that the said George K. Mackie Fuel Company resume operations at mines "H" and "J" on Monday morning, February 21, 1921 in the usual way, and it is further directed that the Executive District Board of the United Mine Workers of America of District No. 14 and the officers of Local Unions numbers 310 and 498 of which the miners working in said mines are members call off said strike and permit said miners to resume work at said mines on Monday morning, February 21, 1921 and that said Executive District Board shall annul said strike order in this case and shall issue a proper order directing the members of said local unions working in said mines "H" and "J" to resume work in accordance with the terms and conditions of the contract now existing.

It is further ordered that the Southwestern Interstate Coal Operators Association and all parties named herein shall render all assistance possible and do all things necessary to carry into effect the requirements of this order.

By the court it is so ordered:

W. L. Huggins, C. M. Reed, George H. Wark, Judges. [Seal of the Court of Industrial Relations, State of Kansas.]

Attest: R. C. Dellinger, Asst. Clerk. (Seal.)

2. *Quaere:* Whether as a matter of statutory construction, § 19 of this act, which declares that one who uses his position as an officer of a union, or as an employer, to influence violations of the act or of valid orders of the Court of Industrial Relations shall be deemed guilty of a felony, is separable from the system of compulsory arbitration held invalid? P. 290.
3. A declaration in a statute that it shall be conclusively presumed the legislature would have passed the statute without any part of it found invalid by the courts, provides a rule which may aid in determining the legislative intent, but is not an inexorable command. *Id.*
4. In reviewing a judgment of a state court, this Court may not only correct errors but may make such disposition of the case as justice may require in view of changes in law and fact that have supervened since the judgment was entered. P. 289.
5. Where a conviction under § 19 of the above mentioned statute was affirmed by the Supreme Court of Kansas before this Court had, in another case, declared a closely related part of the same act unconstitutional, *held* that the question whether § 19 is separable should be remitted for primary determination by that court. P. 290.

112 Kans. 235, reversed.

ERROR to a judgment of the Supreme Court of Kansas which affirmed a judgment entered against the plaintiff in error in a criminal prosecution, under § 19 of the Court of Industrial Relations Act of Kansas.

Mr. John F. McCarron and *Mr. Phil H. Callery*, with whom *Mr. Redmond S. Brennan* and *Mr. Frank Bonar Hegarty* were on the brief, for plaintiff in error.

Mr. John G. Egan, Assistant Attorney General of the State of Kansas, and *Mr. Chester I. Long*, with whom *Mr. Charles B. Griffith*, Attorney General, *Mr. Austin M. Cowan* and *Mr. William E. Stanley* were on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Court of Industrial Relations Act was approved January 23, 1920. Laws of Kansas, 1920, Special Session,

c. 29. The purpose of the statute is to ensure continuity of operation in coal mining and other businesses declared to be affected with a public interest.[1] The means provided for accomplishing this is a system of compulsory arbitration of industrial disputes. The instrument is the so-called industrial court. Upon it is conferred power to investigate all matters involved in such controversies; to make findings thereon; to issue such orders as it may deem needful, fixing the wages to be paid, the hours of work, the rules for work, and the working and living conditions. The provisions in aid of the enforcement of this system are both comprehensive and detailed. The employer is prohibited, among other things, from limiting or ceasing operations with a view to defeating the purpose of the statute. Likewise, every association of persons (*e. g.*, trade unions) is prohibited from acting to that end. In effect, strikes and lockouts, the boycott and picketing, are made unlawful. Any person violating any provision of the statute, or any order of the so-called court, is declared guilty of a misdemeanor. Some of the provisions of the act were considered in *Howat* v. *Kansas*, 258 U. S. 181, and in *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522.

Section 19 provides that any officer of a union of workmen engaged in an industry within the provisions of the act, who shall wilfully use the power incident to his official position to influence any other person to violate any provision of the statute or any valid order of the Court of

[1] Section 2 of the statute, as enacted, conferred upon the Court of Industrial Relations the functions theretofore performed by the Public Utilities Commission. These functions were restored to a Public Utilities Commission by c. 260, Laws of 1921. There was conferred upon the Court of Industrial Relations by c. 262 of the Laws of 1921 the functions theretofore performed by the Commissioner of Labor and Industry, and by c. 263 of the Laws of 1921 the functions theretofore performed by the Industrial Welfare Commission. These latter powers were also enlarged.

Industrial Relations, shall be deemed guilty of a felony punishable by a fine not to exceed $5,000, or by imprisonment at hard labor, not to exceed two years, or by both such fine and imprisonment. Under this section an information was filed against Dorchy, a union official, for calling a strike in a coal mine. He was found guilty. The judgment entered was affirmed by the highest court of the State, 112 Kans. 235; and a rehearing was denied. The case is here on writ of error under § 237 of the Judicial Code as amended. It is contended that § 19 is void, because it prohibits strikes; and that to do so is denial of the liberty guaranteed by the Fourteenth Amendment.

After the judgment under review was entered in the Supreme Court of Kansas, this Court declared, in the *Wolff Packing Co. Case, supra,* p. 544, that the system of compulsory arbitration as applied to packing plants, violates the Federal Constitution. For the reasons there set forth, it is unconstitutional, also, as applied to the coal mines of that State. The question suggests itself whether § 19 has not, therefore, necessarily fallen as a part of the system of compulsory arbitration. If so, there is no occasion to consider the specific objection to the provisions of that section. This Court has power not only to correct errors in the judgment entered below, but, in the exercise of its appellate jurisdiction, to make such disposition of the case as justice may now require. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis,* 224 U. S. 503, 506. In determining what justice requires the Court must consider changes in law and in fact which have supervened since the judgment was entered below. *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione,* 248 U. S. 9, 21. If § 19 falls as the result of the decision in the *Wolff Packing Co. Case,* the effect is the same as if the section had been repealed without any reservation.

A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand

if separable from the bad. *Berea College* v. *Kentucky*, 211 U. S. 45, 54–56; *Carey* v. *South Dakota*, 250 U. S. 118, 121. But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall. Section 19 does not, in terms, prohibit the calling of strikes or influencing workingmen to strike. It merely declares that one who uses his official position, or his position as an employer, to "influence, impel, or compel any other person to violate any of the provisions of this act, or any valid order of said Court of Industrial Relations, shall be deemed guilty of a felony." Most of the provisions of the original act are very intimately connected with the system of compulsory arbitration. Whether § 19 is so interwoven with the system held invalid that the section cannot stand alone, is a question of interpretation and of legislative intent. Compare *Butts* v. *Merchants Transportation Co.*, 230 U. S. 126. Section 28 of the act,[2] (which resembles that discussed in *Hill* v. *Wallace*, 259 U. S. 44, 70, 71) provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command.

The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this Court. *Gatewood* v. *North Carolina*, 203 U. S. 531, 543; *Guinn* v. *United States*, 238 U. S. 347, 366;

[2] Section 28: "If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court."

Schneider Granite Co. v. *Gast Realty Co.*, 245 U. S. 288, 290. In cases coming from the lower federal courts, such questions of severability, if there is no controlling state decision, must be determined by this Court. Compare *Myers* v. *Anderson*, 238 U. S. 368, 381; *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 311. In cases coming from the state courts, this Court, in the absence of a controlling state decision, may, in passing upon the claim under the federal law, decide, also, the question of severability. But it is not obliged to do so. The situation may be such as to make it appropriate to leave the determination of the question to the state court. We think that course should be followed in this case.

The Supreme Court of Kansas has already dealt, to some extent, with the effect of our decision upon other sections of the act. When a motion was made there in the *Wolff Packing Co. Case* to spread the mandate of this Court upon its record, the state court held that the order of the Court of Industrial Relations under review remains in force in so far as it regulates hours of labor and weekly rest periods. 114 Kans. 304. The judgment then entered was modified November 10, 1923, upon a rehearing.[3] [114 Kans. 487.] The relation of § 19 to the provisions held invalid is a different matter. So far as appears, the state court has not passed upon the question whether § 19, being an intimate part of the system of compulsory arbitration held to be invalid, falls with it. In order that the state court may pass upon this question, its judgment in this case, which was rendered before our decision in the *Wolff Packing Co. Case*, should be vacated. Compare *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis, supra*, p. 509. To this end the judgment is

Reversed.

[3] The action of the state court has been brought here for review by proceedings entered February 16, 1924, and not yet disposed of.